Supreme Court, U.S.
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No. 96-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Delaware

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether Section 505 of the Telecommunications Act of 1996 violates the First Amendment because it imposes a significant burden on constitutionally protected speech and where less restrictive measures fully address the government's articulated interest.

(2) Whether Section 505 of the Telecommunications Act of 1996 violates Equal Protection guarantees under the Fifth Amendment because it singles out particular speakers for uniquely unfavorable treatment.

(3) Whether Section 505 of the Telecommunications Act of 1996 violates the First Amendment because it imposes unconstitutionally vague regulatory obligations on protected speech.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Appellant Playboy Entertainment Group, Inc. along with Graff-Pay-Per-View, Inc. were the plaintiffs in the court below. The United States of America, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission were the defendants.

Playboy Entertainment Group, Inc. is a non-publicly traded corporation organized under the laws of Delaware and is a wholly owned subsidiary of Playboy Enterprises, Inc., a publicly traded company organized under the laws of Delaware. Pursuant to Supreme Court Rule 29.6, Appellant notes that it owns minority equity positions in the Playboy Television United Kingdom Co., Playboy Channel Japan, and Playboy Television Latin America, L.L.C.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge District Court (App. 1a-40a) is reported at __ F. Supp. __.

JURISDICTION

The judgment of the District Court was entered on November 8, 1996. App. 41a. Appellant's notice of appeal was filed the same day. App. 42a. The jurisdiction of the

District Court was based on Section 561(a) of the Communications Decency Act of 1996, 110 Stat. 142-143, and 28 U.S.C. §§ 1331, 2284. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech * * *." The Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law * * *." The provisions of Sections 504 and 505 of the Communications Decency Act of 1996 are reproduced at App. 44a.

STATEMENT OF THE CASE

This appeal concerns the constitutionality of Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Appellant Playboy Entertainment Group, Inc. ("Playboy") has challenged Section 505 as violating the First Amendment and the Equal Protection Guarantee of the Fifth Amendment to the United States Constitution. The three judge District Court below denied Playboy's Motion for a Preliminary Injunction.[1] Playboy appeals that denial, and the District Court has granted a stay against the enforcement of Section 505 pending the resolution of this appeal.

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[1]A district court of three judges was convened pursuant to Section 561 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 142-143.

A. FACTUAL BACKGROUND

1. The Telecommunications Act of 1996 and Section 505

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act"), adopted a constellation of regulatory measures designed to empower parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 of the Act requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel.[2] Similarly, Section 551, the so-called V-chip provision, mandates that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."[3]

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[2]Section 504 defines scrambling as rearranging the content of the channel "so that the programming cannot be viewed or heard in an understandable manner." It is codified at 47 U.S.C. § 560. These new regulatory measures supplemented a requirement in the 1984 Cable Act that cable operators provide (by sale or lease) "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d). These devices are commonly referred to as lockboxes.

[3]Such measures are predicated on congressional findings that parents have and will take an active role in supervising their children. For example, Congress found that "[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control . . ." Section 551(a)(7). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. *Id.* at (a)(9). Section 551 of the Act is codified at 47 U.S.C. § 303.

Congress also enacted Section 505, which requires that for any channel of service "primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channels so that one not a subscriber to such channel or programming does not receive it."[4] Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was passed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. -- two thirds of the broadcast day.[5]

Unlike Sections 504 and 551, Congress adopted Section 505 of the Act without hearings or debate.[6] Section 505 was introduced as a floor amendment by Senators Lott and Feinstein, both of whom made brief remarks about it. App. 13a. *See* 141 Cong. Rec. S8166-69. Other than these remarks, Congress held no hearings, had no debates, nor

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[4]Section 505 applies to all multichannel video programming distributors, and not just cable television system operators. The District Court's opinion refers to a cable operator as a "multisystem operator" or "MSO." App. 6a n.9. For ease of reference this brief will use the term cable operators generically. Section 505 is codified at 47 U.S.C. § 561.

[5]*In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 FCC Rcd. 5386 (1996) (*"FCC Interim Order"*).

[6] Section 505 was proposed as an amendment to the Senate telecommunications bill (S. 652) on June 12, 1995, and was voted upon and passed that same evening. 141 Cong. Rec. S8166-69 (daily ed. June 12, 1995). In the conferences to resolve the differences between the House and Senate bills, the amendment became Section 505 of the Act.

made any legislative findings concerning Section 505. App. 14a.

2. Playboy Programming

Playboy provides cable operators with adult, sexually oriented programming on two "premium" networks - Playboy Television and AdulTVision. Cable operators offer these networks to their customers as either a premium subscription channel or a pay-per-view channel. Premium channels are offered to only those cable customers who pay an additional monthly fee.[7] Pay-per-view channels are made available to only those customers who specifically order a specific program or time block (usually two to four hours) on a given day.

Playboy Television provides adult oriented programming that includes films, short form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Playboy Television also offers special event programming such as Playboy's well received 4-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. AdulTVision offers almost exclusively full-length movies. In addition to providing programming to cable operators, Playboy also licenses its programming to other networks such as Showtime and HBO, who periodically show the same or very similar programming. These premium networks also license from third party distributors some of the same movies that are shown on Playboy's networks.

3. Signal Scrambling and Signal Bleed

Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The cable operators must descramble these transmissions before rescrambling the signal to restrict access to only those

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[7]By way of contrast, "basic" channels -- such as local broadcast stations -- are those offered to all customers in a cable system.

customers who have paid for the service. When a cable customer subscribes to the premium channel or orders a pay-per-view program, the cable operator descrambles the signal to that television set.

Because many cable operators lack the equipment to scramble the audio signal, only the video portion of the signal is scrambled on many cable systems. These systems permit the unscrambled audio to come through, unless certain devices are placed on the line that fully remove both the audio and video portion of the signal. App. 9a.[8] Additionally, the video signal can, at times, become discernible despite the scrambling. This phenomenon is attributable to multiple causes, including weather conditions, faulty or old equipment, human error, and advances in electronic circuitry technology that enable modern televisions to temporarily form a discernible picture despite the scrambling. App. 10a-11a.

For purposes of this case, discernible video and/or audio for unpurchased premium networks have been referred to as "signal bleed". Playboy and Graff Pay-Per-View ("Graff")

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[8]These devices include "negative" or "positive" traps which are less expensive to purchase but preclude pay-per-view television, and mapping converter decoder boxes which allow pay-per-view television but are extremely expensive at approximately $115 per television per household. The government suggests that cable operators use "double scrambling" to comply with Section 505, that is a system where the cable operator uses two different scrambling technologies simultaneously to minimize signal bleeding while providing to each authorized subscription or pay-per-view viewer devices to unscramble the audio and video signal. However, even the government's technical expert acknowledged that cable operators will opt for time channeling over double scrambling based on estimated revenue loss, the capital investment required and the risk of non-compliance--that bleeding may still occur when double scrambling is employed.

were the only programmers identified by the bill's sponsors as targets of this legislation.[9]

B. PROCEDURAL BACKGROUND

Playboy brought suit in the United States District Court for the District of Delaware seeking a declaration that Section 505 was unconstitutional and seeking an injunction against its enforcement. App. 3a-4a. Playboy alleges that Section 505 unlawfully (1) restricts its freedom of speech and the rights of those adults who wish to receive its programming, (2) violates equal protection, and (3) is unconstitutionally vague. App. 22a. Subsequently, Graff filed suit seeking similar relief on nearly identical grounds. *Graff Pay-Per-View* v. *United States*, Civ. Act. No. 96-107. The two cases were consolidated.

Before Section 505 took effect, Playboy and Graff sought and received a temporary restraining order enjoining its implementation and enforcement. *Playboy Entertainment Group, Inc.* v. *United States*, 918 F. Supp. 813 (D. Del. 1996). By agreement of the parties, the temporary restraining order remained in effect pending the District Court's decision on Playboy's motion for a preliminary injunction.

Pursuant to Section 561 of the Act and 28 U.S.C. § 2284, a three-judge court was convened to hear the case. App. 4a. After a hearing on the motion for a preliminary injunction, the District Court postponed its ruling pending this Court's decision in *Denver Area Educational Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996). App. 5a.

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[9]In introducing Section 505, Senator Feinstein said that the provision was meant to apply to "the Playboy and Spice channels." 141 Cong. Rec. S8167. The FCC, in implementing the law, described the operative language as "self-effectuating," and found it unnecessary even to seek comments on the meaning of the term "primarily dedicated" to sexually-oriented programming. *FCC Interim Order*, 11 FCC Rcd. at 5387.

On November 8, 1996, the District Court denied Playboy's motion for a preliminary injunction. The FCC promptly issued a Public Notice stating that it immediately would enforce Section 505. *FCC Public Notice*, DA 96-1906 (Nov. 15, 1996). Upon Playboy's and Graff's motions for a stay of enforcement pending appeal, the District Court stayed Section 505 until this appeal is decided.

In its decision denying the preliminary injunction, the District Court held that Playboy and Graff were not likely to succeed on the merits of their constitutional claims. With respect to Playboy's First Amendment claim, the District Court concluded that Section 505 was a content based discrimination on speech because it applied only to the transmission of "sexually explicit programming or other programming that is indecent." Accordingly, the District Court determined that "strict scrutiny or something very close to strict scrutiny" applies, App. 25a, and that Section 505 should be struck down unless it serves a compelling state interest and is carefully tailored to serve that end. The District Court found the requisite compelling interest in this Court's precedents that indicate a need to protect children from sexually explicit material.

The District Court then found that Section 505 was the least restrictive means to accomplish this end. In doing so, the District Court observed that cable operators can comply with Section 505 in two ways: they can either fully scramble or block channels such as Playboys' or time-channel such programming between 10:00 p.m. and 6:00 a.m. App. 32a. Playboy argued that, for many cable operators, the cost of complying with the full scrambling option would be prohibitive. The court agreed that "[t]here is undoubtedly a substantial expense involved in complying with" Section 505(a), but concluded that the lawfulness of the full scrambling requirement was "not determinative" because under Section 505(b) cable operators have the option to time-channel. App. 32a, 33a. It reasoned that "if the time-channeling alternative provides a constitutional means of

compliance with § 505, then § 505 is constitutional." App. 33a.

The District Court upheld the validity of time channeling by relying heavily on *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), which, in the District Court's view, "endorsed a time-channeling solution in very similar circumstances." App. 33a. The District Court held that Section 505(b) was constitutional because it does not entirely ban sexually oriented programming but instead leaves adults with "an opportunity" to view such programming. App. 34a. The court did not explain how much of "an opportunity" short of an outright ban was constitutionally adequate. More importantly, it did not take note of the crucial difference between the broadcast media in *Pacifica* and cable, namely that cable channels can be screened from individual homes upon request, while radio broadcasts cannot.

The District Court then rejected Playboy's argument that Section 504 of the 1996 Act provides a less restrictive alternative to Section 505. App. 34a-36a. Section 504, which requires full scrambling of *any* cable channel upon the request of a subscriber, eliminates unwanted signal bleed without putting cable operators to the burden and expense of fully scrambling or blocking transmission to every cable subscriber (including the two-thirds of U.S. households that have no children) or forcing them to implement time-channeling. The District Court, however, questioned the effectiveness of Section 504, pointing to the absence of evidence in the record that parents are aware of the recently enacted § 504 or that the cable industry was advertising it. This effectively put the burden of proof on Playboy that Section 505 was not the least restrictive means, rather than correctly requiring the government to demonstrate the ineffectiveness of Section 504 or other safeguards in the Act.

The District Court next turned to Playboy's equal protection challenge. Playboy argued that Section 505 violates equal protection because it applies only to cable channels "primarily dedicated to sexually-oriented programming" -- such as Playboy's -- even though other

premium channels like HBO and Showtime also air similar sexually oriented programming. The District Court rejected this argument, finding a valid distinction in the proportion of such programming on the various networks. Applying rational basis review, the District Court found that "Congress thus made a logical distinction and tailored the law in an acceptable manner." App. 38a-39a & n. 31.

Finally, the District Court rejected Playboy's argument that Section 505 is unconstitutionally vague. Playboy argued that the terms "sexually explicit adult programming or other programming that is indecent" and cable channels "primarily dedicated to sexually-oriented programming" are not properly defined nor are they subject to definition. App. 39a-40a. The District Court held that these terms have been used over time by other Courts and the FCC and, so, have acquired the requisite constitutional meaning.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Just last Term, this Court in *Denver* held that the governmental interest in screening children from "indecent" speech on the radio, upheld in *Pacifica*, 438 U.S. at 748, also applies to cable television. 116 S. Ct. at 2386-87 (plurality opinion). This Court expressly avoided making a "definitive choice among competing analogies" or declaring "a rigid single standard, good for now and for all future media and purposes," *id.* at 2385, that would automatically include or exclude a particular medium from regulation. After *Denver* it is no longer tenable to assert that indecency regulations apply to broadcasting, but never to cable television.[10]

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[10]*But see Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2457 (1994) (citing *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 63, 74 (1983) (distinguishing *Pacifica*)); *Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987).

This conclusion, however, was just the beginning of the legal analysis, not the end, and it is a reason why the instant case presents substantial constitutional questions requiring plenary review by this Court. Despite the *Denver* plurality's discussion of *Pacifica*, this Court applied a First Amendment standard of review that the District Court below correctly described as "strict scrutiny or something very close to strict scrutiny." App. 25a.[11]

This Court in *Denver* recognized that "other means to protect children" are available with cable television technology, 116 S. Ct. at 2392, and it expressly struck down a "blocking and segregation" requirement that the government in this case described as "very similar" to Section 505. In practical terms, the *Denver* decision means that a cable operator may transmit totally unscrambled non-obscene images of "oral sex, bestiality, and rape" on leased or public access channels at any time of the day or night. *Id.* at 2390 (plurality op.). The editorial discretion to permit such programming (that by federal law is banned from the broadcast airwaves until late at night) on cable access channels is explained by the fact that this Court's cases "since *Pacifica* have * * * turned as much on the context or medium of the speech as on its content." *Id.* at 2401 n.2 (Souter, J., concurring).

This case presents substantial questions of constitutional law because the District Court below ignored the important contextual differences between the radio transmissions at issue in *Pacifica* and the cable television signals at issue here. Failure to account for these differences led the lower court to apply the wrong standard of review and to misanalyze the relative burdens, with devastating consequences for Appellant's ability to transmit protected speech.

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[11]The majority in *Denver* (who signed Section III of the opinion), expressly declined to endorse a lower level of First Amendment protection for "indecent" speech. 116 S.Ct. at 2391.

Plenary review is essential for additional reasons that go beyond the basic need to vindicate Appellant's First Amendment rights. This Court in *Denver* noted its acute awareness "of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications." 116 S. Ct. at 2385 (plurality opinion). These changes already are beginning to raise vital First Amendment questions associated with the emergence of new technologies.[12] This Court's guidance is essential to "keep the starch in the standards," 116 S. Ct. at 2401 (Souter, J., concurring), as regulators seek to determine if the government can supplant voluntary parental actions to protect children, and if regulatory mechanisms such as "time channeling" can be applied to speech in new and different contexts.[13]

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[12]This Court recently noted probable jurisdiction in a case that raised a constitutional challenge to different provisions of the 1996 Act involving "indecent" speech in the on-line computer context. *See Reno* v. *ACLU*, 117 S. Ct. 554 (1996).

[13]Legislation introduced in the 104th Congress would require broadcasters and cable operators to employ time channeling to prevent any "violent video programming" from being transmitted "during hours when children are reasonably likely to comprise a substantial portion of the audience." S. 470, 104th Cong., (1995). Senator Ernest Hollings, the bill's sponsor, defended its constitutionality on the basis that courts have upheld the use of the "safe harbor" approach for indecent broadcasts. 141 Cong. Rec. S3059-60 (daily ed. Feb. 23, 1995) (statement of Sen. Hollings). Senator Hollings has pledged to reintroduce the bill this year, *Valenti Defends Proposed TV Ratings, Attacks Opponents*, COMMUNICATIONS DAILY, Dec. 13, 1996, at 4, which, if passed, will raise significant constitutional questions. *See, e.g., Winters* v. *New York*, 333 U.S. 507 (1948); *Video Software Dealer's Ass'n* v. *Webster*, 968 F.2d 684 (8th Cir. 1992).

I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE SECTION 505 IMPOSES SIGNIFICANT BURDENS ON PROTECTED SPEECH AND BECAUSE FULLY EFFECTIVE LESS RESTRICTIVE MEASURES EXIST

The District Court found as a factual matter that Section 505(a) would "undoubtedly" impose "substantial expense" upon cable operators and "potentially fatal economic burdens," including the "possibility of bankruptcy" of the targeted networks. App. 32a, 33a. The court acknowledged that the cable operators "that have taken a position on the method by which they would comply with § 505(a) have all announced that they would adopt time channeling." App. 20a (emphasis added). Under this alternative, Playboy would be forced to curtail drastically -- by 16 hours per day -- the time during which service could be provided, a limitation that carries its own significant economic consequences.[14]

As discussed in more detail below, the curtailment of Appellant's ability to communicate with willing viewers constitutes the core First Amendment problem here. But economic burdens imposed by the law are important as well, and the District Court erroneously discounted the constitutional implications of such effects because it applied the wrong First Amendment standard. The level of scrutiny applied below was attenuated substantially by the District Court's repeated references to signal bleed as a "secondary effect." App. 26a, 27a, 29a n.26, 32a n.27. Although it purported to apply strict scrutiny, the court below

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[14]By Playboy's estimate, restricting its programming to the hours between 10:00 p.m. and 6:00 a.m. would result in a 20-25% annual revenue loss or approximately $4.5 million per year. Lynn Decl. ¶¶ 27-28. In Hartford, Connecticut, time channeling resulted in revenue losses of at least 30 percent.

acknowledged that its assessment of the constitutional burdens derived from "zoning cases" and regulations "directed at competing concerns of public welfare rather than at the speech itself." *Id.* at 32a n.27 (citing cases following *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

But Section 505 *is* "directed at * * * the speech itself." *Id.* Indeed, the District Court specifically found that Congress adopted § 505 to address the "same problem" as § 10 of the 1992 Cable Act (which was largely invalidated in *Denver*), to prevent "unwanted images and sounds" from being available in "households that * * * have not subscribed to the adult channel." App. 26a-27a. This Court has held repeatedly that *Renton* "secondary effects" analysis does not apply where regulation of adult movie theaters is based on "the content of the films being shown inside the theaters."[15] When this case is analyzed under the correct constitutional standard, and not under the *Renton* line of zoning cases, the significant First Amendment burdens of § 505 are "obvious." *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-116 (1991) (quoting *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991)); *Erznoznik*, 422 U.S. at 211-212.

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[15] *Boos* v. *Barry*, 485 U.S. 312, 320-321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134-136 (1992). *See also Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214-215 (1975); *Schneider* v. *New Jersey*, 308 U.S. 147, 162-163 (1939).

A. The Time Channeling Requirement of Section 505(b) Significantly Restricts Appellant's Speech by Effectively Banning its Networks for Two-Thirds of the Broadcast Day

Contrary to the District Court's finding below, cable operators are not "free to choose to comply with § 505 by time-channeling." App. 33a. Compliance is compulsory. Section 505 also differs from the other protective measures contained in the Telecommunications Act, such as voluntary blocking pursuant to § 504, in that "time channeling" cuts off programming service to *all households* in a cable system, including the two-thirds of homes with no minor children.[16]

As a result of these differences, Section 505(b) interrupts the flow of constitutionally-protected communication between a "willing speaker" and willing recipients.[17] This is a fundamental breach of the constitutional principle that "'[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *.'" *Turner Broadcasting System*, 114 S. Ct. at 2479-80 (O'Connor, J., concurring in part and dissenting in part) (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) (citation omitted)).

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[16] *Statistical Abstract of the United States 1995*, Dep't of Commerce, Econ. & Stats. Admin., Bur. of Census (115 ed. Sept. 1995).

[17] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756-757 (1976); *Council for Periodical Distributors Ass'n* v. *Evans*, 642 F. Supp. 552, 559-560 (M.D. Ala. 1986), *aff'd in relevant part*, 827 F.2d 1483 (11th Cir. 1987) (when government action "restricts the flow of protected materials along a chain of distribution, all persons along that chain are affected").

In upholding the time-channeling requirement, the District Court simply asserted that "the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*." App. 33a-34a. But while the rules at issue in *Pacifica*, Section 10 at issue in *Denver*, and Section 505 at issue here may all involve the "same problem," App. 26a, it is incorrect to assume that one regulatory solution applied to different media represents "very similar circumstances," App. 33a, or imposes the same burdens.

The District Court's conclusion ignores the contextual differences of the media involved. It equates a medium that has *never been permitted* to transmit adult-oriented programming throughout the day,[18] with one that *always has been permitted to do so*.[19] The net effect is that cable television networks will selectively be required to go dark for most of the broadcast day for the first time in history. No court has ever -- until now -- approved a cutback in service of two-thirds of a cable network's ability to reach willing viewers. *Cf. Becker* v. *FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred

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[18]Before the FCC proceedings that led to this Court's *Pacifica* decision, it was assumed that broadcasters generally could not transmit indecent speech at all. *See* 18 U.S.C. § 1464 (generally prohibiting the broadcast of "obscene, indecent or profane language"). In almost two decades of litigation following *Pacifica*, the government struggled to establish a "safe harbor" period for broadcasters that would survive constitutional challenge. As a practical matter, this expanded broadcasters' ability to transmit programming that never would have been permitted before *Pacifica*. *See, e.g., NYPD Blue*.

[19]*See Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp.at 1110 (impact of indecency time channeling is far more burdensome for cable network than for broadcast station); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985).

audience" and "inevitably interfere[s] with * * * freedom of expression").[20]

Denver does not support the District Court's conclusion that *Pacifica* permits the imposition of such a burden on speech.[21] While this Court upheld cable operators' editorial discretion to move certain programs to later hours, it expressly avoided mandatory requirements. 116 S. Ct. at 2387 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*"); *id.* at 2398 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."); *id.* at 2403 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming.); *id.* at 2424 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right . . . to compete for space on an operator's system.").

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[20]*See also Gillett Communications of Atlanta, Inc.* v. *Becker*, 807 F. Supp. 757, 763-764 (N.D. Ga. 1992) (holding that Becker's advertisements were indecent because credible evidence had been presented to demonstrate that images of bloody fetuses in political advertisements would prove psychologically damaging to children), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993).

[21]*Pacifica* only upheld the government's ability to subject a particular broadcast to subsequent review. 438 U.S. at 735-738. It did not authorize the Commission prospectively to designate entire networks for wholesale blackouts, as is the case here. *See United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995) (blanket rule "chills potential speech before it happens" and imposes greater First Amendment burden than "an isolated disciplinary action").

B. Section 505 is Excessively Burdensome Because Less Restrictive Means of Protecting Children Already Exist

Just as with its assessment of the burden on speech, the District Court's conclusion that time channeling was sufficiently tailored to survive First Amendment scrutiny was predicated entirely on the Supreme Court holding in *Pacifica*. App. 33a-34a. But the conclusion once again ignores context. Even if time channeling might be the least restrictive means of regulating free over-the-air broadcasting, as in *Pacifica*, the same conclusion does not follow in the current context. The "safe harbor" rules have always been predicated on the fact that blocking technology does not exist for free television.[22] With cable television, by sharp contrast, as this Court discussed in some detail in *Denver*, lockboxes exist and may be provided free to the subscriber upon request under § 504. Such technology "succeeds in fully scrambling unwanted cable signals." App. 16a.[23]

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[22] *See In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5309 (separating children from adults in the broadcast audience is an "impossibility"); *see also id.* at 5305 ("parents' control of children's television viewing * * * differs from parental control of cable viewing. * * * Most television receivers do not permit blocking of specific channels. * * * There is no evidence in the record that a lock-box type of device is available for attachment to televisions. * * * to prevent access to specific [broadcast] channels."). *See also Denver*, 116 S. Ct. at 2401 (Souter, J., concurring) ("broadcasts [are] * * * difficult or impossible to control without immediate supervision").

[23] Ironically, the District Court did not discuss whether time channeling would in fact protect children. With respect to Section 10, at issue in *Denver*, the FCC had found that time channeling is inadequate to prevent viewing by children. *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1009 (1993).

In *Denver*, this Court invalidated mandatory blocking and segregation requirements for indecent speech on leased access channels because of these less restrictive means. Acknowledging that no regulatory provision "short of an absolute ban" on indecent speech will completely protect children from potential exposure. *Denver*, 116 S. Ct. at 2393 (plurality op.), this Court compared the various restrictions contained in the 1984 Cable Act (lockboxes), the 1992 Cable Act (segregation and blocking of indecent leased access programs) and the Telecommunications Act of 1996 (Sections 504, 505 and the V-chip requirement) and found that the blocking and segregation requirement failed to satisfy even intermediate review, not to mention strict scrutiny. *Id.* at 2391-92 (plurality op).[24]

This Court in *Denver* emphasized the existence of permissive, rather than mandatory solutions, even if, as a result, the potential exposure of children to indecent materials was not totally eliminated. 116 S. Ct. at 2393 (deficiencies of lockboxes, including the problem of "inattentive parents," "do not show the need for a provision as restrictive as the one before us"). Whatever deficiencies that might exist, this Court said, should be cured by less burdensome means, such as informational requirements. *Id.* at 2393-94. This Court stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Id.* at 2393. (plurality op.) (emphasis in original) (citing *Boos* v.

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[24]This Court mentioned Section 505 as one potentially less restrictive alternative in *Denver*. However, it would have been strange if Section 505 had not been included in the list of regulatory alternatives since this Court analyzed the Communications Act "as recently amended." 116 S. Ct. at 2392. In any event, this Court emphasized that the constitutionality of Section 505 and other Telecommunications Act provisions was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*; *see* App. 36a n.29.

Barry, 485 U.S. at 329). The same analysis applies to Section 505.

C. The District Court Erroneously Shifted the Burden of Proof

Under the applicable constitutional standard, it is the government's burden to demonstrate that less restrictive measures are unavailable to protect minors from indecent speech. *Denver*, 116 S. Ct. at 2391-93; *Sable Comms. of California, Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). It is not enough for the government to show that its end is compelling, it must also show that the means chosen "are carefully tailored to achieve those ends." *Id.* at 126. This constitutional requirement is especially true in cases where, as here, less restrictive means to address the governments' concerns exist. In such cases, it is not Appellant's burden to demonstrate the effectiveness of such measures. Yet that is precisely what the District Court ordered in this case.

In analyzing voluntary blocking measures, such as the requirements of Section 504, the District Court stated:

> We have not, however, received evidence that MSOs are advising cable customers of the availability of the free channel blocks under § 504. Nor is there evidence that customers are responding to such notices, if given, Thus, we cannot effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed.

App. 17a. The District Court found that the government had demonstrated "an expectation" that § 504 will not be a viable alternative, "[t]he main difference [being] that under § 504 the household has to request the box, while under § 505 the MSO must provide the box." *Id.* at 35a

Whether or not the government "expects" Section 504 to fail despite its recent enactment, the Constitution demands a

higher level of proof. Thus, in *Sable*, this Court struck down a statutory ban on dial-a-porn messages that superseded less restrictive FCC rules designed to limit children's' access to indecent telephone messages. The government asserted the same "expectation" in *Sable* as here: that "the rules would not be effective enough." 492 U.S. at 128. But this Court noted that "[t]here is no evidence in the record before us to that effect, *nor could there be* since the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time." *Id.* at 128-129 (emphasis added). This Court also declined to defer to congressional findings that the FCC's rules were not a less restrictive alternative. *Id.* at 129.[25] The same situation applies here. Section 504 was adopted in February 1996, at the same time as Section 505. There has been no realistic opportunity to assess its effectiveness. Indeed, the government made no attempt to do so.

This Court in *Denver* noted that there was no evidence "'as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be.'" *Id.* at 2394, quoting *Sable*, 492 U.S. at 130 (emphasis in original). But this was taken as a reason to invalidate the more restrictive mandatory measures, not to uphold them. The District Court's conclusion below, therefore, is contrary to this Court's rulings in both *Sable* and *Denver*.

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[25]It is noteworthy that all of the congressional findings contained in the Telecommunications Act support a conclusion that parental oversight would be sufficient to protect children so long as parents were provided with sufficient tools. The Act, §§ 551(a)(8) and (a)(9).

II. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE SECTION 505 SINGLES OUT APPELLANT'S SPEECH FOR UNIQUELY UNFAVORABLE TREATMENT IN VIOLATION OF EQUAL PROTECTION REQUIREMENTS

Section 505 violates Fifth Amendment Equal Protection requirements because it singles out Appellant for uniquely unfavorable treatment. This equal protection principle has its most urgent application when the government seeks to punish a small class of speakers. This Court has long held that regulations that discriminate among the media, or among different speakers within a single medium, present special First Amendment problems. *Arkansas Writers' Project Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250-251 (1936).

The District Court erred in attempting to distinguish this body of law. Defining the content of Appellants' programming as a "special characteristic," App. 37a, it found that Congress could "take one step at a time" in dealing with indecent programming on cable television. App. 38a (quoting *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489 (1955)). The court noted that this case does not involve a "suspect class" so that it could uphold the discriminatory treatment under rational basis review. App. 38a n.31. As a factual matter, the District Court found that Congress was justified in treating "non-adult cable channels" differently because they "would not continuously present sexually explicit scenes to the channel surfer." App. 37a. It based this conclusion on an analysis of a single day's television listings from the Denver area. App 37a.

The District Court's cursory treatment of this issue is seriously flawed. First, it disregards this Court's analysis in *Denver*, in which the government's "one step at a time" analysis was expressly rejected. 116 S. Ct. at 2393 (plurality

opinion) ("Congress now has tried to deal with most of the problem.").[26] Second, it improperly reviewed content-based discrimination under a rational basis standard. *See, e.g., Minneapolis Star*, 460 U.S. at 592-93 (any regulation "that targets individual publications within the press, places a heavy burden on the State to justify its action"). And third, the District Court's factual conclusion that Appellant's programming was so different from that presented on other networks so as not to be similarly situated for regulatory or constitutional purposes is patently incorrect.

Nothing supports this final conclusion. Both Congress and the FCC have considered other premium networks and leased access channels as sources of similar "indecent" programming. Section 15 of the 1992 Cable Act was enacted to control unintended access to what Congress deemed "sexually explicit" cable programming. The professed governmental interest was the same as for Section 505: to "keep[ ] a non-subscribing family from being offended by unsolicited movies," to keep "soft core pornography" out of homes unless invited, and to prevent young children from being "exposed to these movies without the knowledge of their parents." 138 Cong. Rec. S589 (daily ed. January 29, 1992) (statement of Senator Helms) ("A great many of the movies presented on movie channels are R-rated. * * * HBO and Cinemax, for example, end up peddling their garbage where and when it is not wanted."). Also, as previously discussed, Section 10 of the 1992 Cable Act was intended to prevent minors from being exposed to indecent programming on public and leased access channels. *Denver*, 116 S. Ct. at 2390.

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[26]In any event, discrimination between different speakers overcomes the usual presumption "that a legislature may deal with one part of a problem without addressing all of it." *Erznoznik*, 422 U.S. at 215; *News America Publishing, Inc.* v. *FCC*, 844 F.2d 800, 815 (D.C Cir. 1988)("courts reject the facile one-bite-at-a-time explanation for rules affecting important First Amendment values").

Despite the identical regulatory interest that applies to other channels, the District Court justifies the differential treatment based on what it perceived as the greater amount of indecent programming and its intensity. Both factors are nothing more than the lower court's generalized assumptions, neither of which is supported by the facts or this Court's jurisprudence. *See e.g., City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (rejecting a selective and categorical restriction based on the "higher ratio of advertising to other text, such as news").

Unlike the newspaper listings upon which the court below relied, studies conducted by the FCC (which were cited by Appellant below) found that "adults can obtain indecent material through cable television" in that "a significant number of R-rated movies are shown on cable."[27] An FCC analysis of MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987 through January 12, 1990 found that 51 percent of the films were rated R. 5 FCC Rcd. at 5308. *See also Denver*, 116 S. Ct. at 2387 (comparing Playboy Television and "Real Sex" on HBO).[28]

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[27]*In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5308-09 (1990); *see also In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd. 8358, 8364, 8367 & n.47. (1989) ("cable television . . . provides adults with access to programming designed for mature audiences" and that "cable offers a significant number of unedited movies for home viewing."). Appellant does not here suggest that the MPAA "R" rating is equal to a finding of indecency. But these references provide some insight into the FCC's assumptions in this regard.

[28]Without any reference to the record or judicial authority, the District Court distinguished "100% sexually explicit" movies on Appellant's networks from movies "with some sexually explicit scenes" on other networks. App. 37a. But the *Pacifica* Court was concerned about programming that "enlarge[s] a child's vocabulary

Finally, it is noteworthy that in *Denver*, this Court upheld Section 10 of the Cable Act because the law treats leased access channels "just as it treats all other channels." 116 S. Ct. at 2397 (plurality opinion). Section 505, by sharp contrast, treats adult-oriented channels completely unlike any other channel, and for that reason, raises a significant constitutional question.[29]

III. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE SECTION 505 IMPOSES UNCONSTITUTIONALLY VAGUE REGULATORY OBLIGATIONS ON PROTECTED SPEECH

The District Court also erred in concluding that § 505 is not unconstitutionally vague. App. 39a-40a. The First Amendment and the Due Process Clause require that restrictions upon speech be sufficiently clear that those subject to the restriction can understand what is forbidden and what is not. *See, e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). Section 505 requires cable operators to fully scramble or time channel any channel "primarily dedicated to sexually-oriented programming" when it provides "sexually explicit adult programming or other programming that is

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in an instant," 438 U.S. at 749, and this record demonstrated that certain R-rated films with little or no sexual content, such as *Beverly Hills Cop II*, averaged one profane word every 30 seconds.

[29]This Court noted with respect to Section 10 that "[a] cable system operator would find it difficult to show that a leased access program prohibition reflects a rational 'policy' if the operator permits similarly 'offensive' programming to run elsewhere on its system at comparable times or in comparable ways." *Denver*, 116 S. Ct. at 2390 (plurality opinion). By the same reasoning, Section 505, which discriminates between speakers, is constitutionally flawed.

indecent." These terms -- none of which is defined in the 1996 Act -- are hopelessly vague.

The indecency doctrine has been subjected to a number of challenges based on its inherent vagueness, and this Court has not yet definitively resolved the issue.[30] The vagueness of the

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[30]This Court has never settled the vagueness question inherent in the indecency standard. The discussion of vagueness in *Pacifica* was not endorsed by a majority of this Court. *Pacifica*, 438 U.S. at 743; *see id.* at 755-56 (Powell, J., concurring) ("[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion"). *See also Carlin Communications, Inc.*, v. *FCC*, 837 F.2d 546, 559 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("Carlin III") ("[t]he *Pacifica* Court declined to endorse the Commission definition of what was indecent"). Subsequent decisions have simply relied on *Pacifica*, and have done nothing to clarify the indecency standard or resolve the vagueness issue. *E.g.*, *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*") ("if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*") ("Our holding in *ACT I* precludes us now finding the Commission's generic definition of indecency to be unconstitutionally vague."), *cert. denied*, 503 U.S. 913 (1992); *Information Providers' Coalition for the Defense of the First Amendment* v. *FCC*, 928 F.2d 866, 874 (9th Cir. 1991)(indecency definition "received the imprimatur of the Court" in *Pacifica*); *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995) ("the Supreme Court's *Pacifica* decision foreclosed the question whether this definition of indecency was unconstitutionally vague"),*aff'd in part and rev'd in part*,116 S. Ct. 2374 (1996); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (dismissing without discussion vagueness claims based on *ACT I* and *ACT II* decisions), *cert. denied*, 116 S.Ct. 701 (1996) ("*ACT III*"); *see also Information Providers' Coalition*, 928 F.2d

indecency concept presents a substantial constitutional question in this case, but it is not the only vagueness issue here, given the new, undefined, statutory terms and mandates introduced by Section 505. It seems clear that the congressional sponsors of Section 505 intended to target Appellant's speech. But beyond this one point of clarity, it is unknown what other networks might be affected, or what Playboy Television might be able to do to "reform" its programming in order to avoid significant limitations on its ability to speak.

A cable operator (or even its lawyer) contemplating the words of Section 505 can do no more than "guess at its contours." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1048 (1991). The statutory terms provide no guidance by which a program provider could try to adjust its programming to conform to the law, as the FCC suggested it might,[31] since the terms "sexually-oriented," "sexually explicit" and "indecent" are not synonymous, *see Erznoznik*, 422 U.S. at 212-213, and because much of the programming on Appellant's networks contains nudity not presented in a sexual context. Nor does the statute define what it means for a channel to be "primarily dedicated" to "sexually oriented programming."[32] Could Playboy Television present "centerfold" videos that contain nudity but no sexual content during non-safe harbor hours without running afoul of

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at 875 ("We note that the *Sable* opinion did not describe the Commission's definition of indecency in *ipsissimis verbis*. No question was presented there, and none here, of the contents of the Commission's definition discussed in *Pacifica*.").

[31] *See FCC Interim Order* 11 FCC Rcd. at 5387 ("we interpret the provision as not requiring the scrambling of programming that is not indecent even if provided on a channel primarily dedicated to sexually-oriented programming").

[32] *FCC Interim Order*, 11 FCC Rcd. at 5387.

§ 505?[33] Or could Playboy Television transmit programming for eleven hours per day on a channel that, for the rest of the day, is devoted to general interest programming without that channel being considered "primarily dedicated" to sexually-oriented programming? These questions are unanswered -- and unanswerable -- by the statutory terms, even if the concept of "indecency" is not unconstitutionally vague on its own.

The District Court erroneously concluded that *Denver* resolved this question by "flatly reject[ing]" a vagueness challenge with respect to "similar terms." App. 39a. But as Justice Kennedy noted in *Denver*, this Court did not consider the constitutionality of the 1996 amendments altering the definition of indecency "to the extent they differ from the provisions here." *Denver*, 116 S. Ct. at 2404 n.* (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part). As noted above, these new statutory terms expand the category of proscribed speech beyond just "indecency." In addition to Section 505, Section 506 of the 1996 Act specifically added "nudity" to the list of proscribable "indecent" programming on public and leased access channels, contrary to the standard discussed by this Court in *Erznoznik*, 422 U.S. at 213.[34]

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[33]The U.S. District Court for the Eastern District of Pennsylvania found it necessary to clarify the terms of its order restraining enforcement of the CDA after the government demonstrated its belief that "centerfold" type images that depict nudity but no sexual activity are "indecent." *See ACLU* v. *Reno*, Civ. No. 96-963 (E.D. Pa. May 15, 1996) (Unpublished Order Clarifying Terms of TRO). *See also En Banc Programming Inquiry*, 44 FCC 2303, 2307 (1960) ("the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464")(citation omitted).

[34]*See* The Act, § 506, 47 U.S.C. § 531. This amendment suggests a congressional assumption that nudity is the same thing as indecency. Such an assumption is consistent with the legislative history of restrictions on leased access channels. *See* 138 Cong.

Even without these differences in statutory reach, *Denver* did not uphold the type of direct regulation embodied in § 505. This Court's finding in *Denver* was focused on "a very particular context - congressional *permission* for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control." 116 S. Ct. at 2386 (plurality op) (emphasis in original). The Court's decision was predicated upon a "complex balance of interests," *id.* at 2387, that includes the "First Amendment interests of cable operators and other [non-leased access] programmers." *Id.* at 2386. Within the permissive framework of Section 10(a), the Supreme Court assumed that cable operators would be prevented from applying an overly broad or vague standard because the law requires the screening of programs "only pursuant to a 'written and published policy.'" *Id.* at 2390 (plurality op.).

No corresponding sensitivity to First Amendment values exists in Section 505. The law imposes new, mandatory statutory terms that seriously restrict protected speech. This Court's plenary review is necessary to resolve the questions raised by this new limitation.

Rec. S646 (daily ed. Jan. 30, 1992) (Statement of Sen. Helms) (listing as examples of "indecency" scenes of "men and women stripping completely nude"). The FCC enforces the same "generic" definition of indecency for both leased access and commercial cable channels governed by § 505. *See FCC Interim Order*, 11 FCC Rcd. at 5387.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to grant plenary review.

Respectfully submitted,

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APPENDIX A

[Filed Nov. 8, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF
Consolidated

PLAYBOY ENTERTAINMENT GROUP, INC. and
GRAFF-PAY-PER-VIEW INC.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, and THE FEDERAL COMMUNICATIONS COMMISSION,
Defendants.

Before: ROTH[1], Circuit Judges, FARNAN[2] and SIMANDLE[3], District Judges

OPINION

Wilmington, Delaware, November 8, 1996

ROTH, *Circuit Judge:*

The plaintiffs in this action, Playboy Entertainment Group, Inc. ("Playboy") and Graff Pay-Per-View

[1] Judge Jane R. Roth, United States Circuit Court Judge for the Third Circuit.

[2] Judge Joseph J. Farnan, United States District Court Judge for the District of Delaware.

[3] Judge Jerome B. Simandle, United States District Court Judge for the District of New Jersey.

("Graff"), challenge the constitutionality of section 505 of the Communications Decency Act of 1996 ("the CDA" or "the Act"), which is Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress enacted section 505 in an effort to eliminate signal bleed, *i.e.*, the partial reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming.

Most cable television systems in the United States offer one or more optional premium channels dedicated to sexually oriented programming. However, of the 62 million households that subscribe to cable television, only about 3 million will purchase or subscribe to adult programming during the course of a year. Cable system operators attempt to block non-subscribers from receiving this programming by various scrambling techniques which we will explain in greater detail in our Findings of Fact. Signal bleed occurs when the scrambling process is not fully successful.

The stated purpose of section 505 is to protect children from signal bleed. Section 505(a) requires a cable television operator to completely scramble or block the video and audio portions of any cable channel that is primarily dedicated to sexually explicit programming. If a cable operator is unable to comply in full with section 505(a), then section 505(b) requires "time channeling", *i.e.*, that sexually explicit adult programming be transmitted only during those hours when children are not likely to view it. The Federal Communications Commission has determined these "safe harbor" hours to be from 10:00 p.m. to 6:00 a.m.

The principal issue facing us is whether government regulation of signal bleed from sexually explicit programming offends the free speech and equal protection rights of adult-programming networks and of their subscriber audience. Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected

speech. Moreover, plaintiffs concede that their programming is essentially 100% sexually oriented, in contrast to other entertainment channels that display only occasional or sporadic sexually explicit scenes or programs. Nevertheless, because the regulatory scheme of section 505 impacts on the transmission of adult programming, which is entitled to First Amendment protection,[4] we will examine whether section 505 is a content-based restriction of speech, and, if so, whether it survives scrutiny by addressing a compelling interest and by being narrowly tailored for that end. We will also consider whether Congress has unconstitutionally singled out networks that are exclusively dedicated to sexually oriented programming, while not regulating signal bleed from other premium networks that at times will transmit sexually oriented programs or scenes. Finally, we will examine plaintiffs' claim that the language of section 505 is unconstitutionally vague.

I.

PROCEDURAL BACKGROUND

President Clinton signed the CDA into law on February 8, 1996. On February 26, Playboy filed this action in the United States District Court for the District of Delaware, seeking a declaratory judgment that § 505 violates the First Amendment and the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution.

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[4] We recognize at the outset that the programming on plaintiffs' sexually dedicated channels is indecent, meaning vulgar or offensively explicit sexual material not generally available for viewing by children, but that it is not obscene. Indecent speech is subject to constitutional protection because it is established that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 783 (3d Cir. 1990); *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S.Ct. 701 (1996); *accord, ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), at 851 (Sloviter, J.), at 858 n.3 (Buckwalter, J.), and at 865-6 (Dalzell, J.).

In addition, Playboy sought injunctive relief that would prohibit enforcement of § 505 by the Government.[5] Graff subsequently filed an action seeking identical relief against the same defendants. On March 4, 1996, Judge Farnan granted Graff's motion to consolidate these actions pursuant to Federal Rule of Civil Procedure 42 (a). That same day, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA. She named Judge Joseph P. Farnan of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.[6]

Because the CDA was to go into effect on March 9, 1996,[7] Playboy requested a temporary restraining order ("TRO") to enjoin implementation and enforcement of § 505 of the Act. On March 6, 1996, Judge Farnan heard oral argument on Playboy's TRO motion.[8] He

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[5] The defendants in this action are the United States; the United States Department of Justice; Attorney General of the United States, Janet Reno; and the Federal Communications Commission ("the FCC"). To simplify matters, we will refer to these defendants jointly as "the Government."

[6] Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title . . . pursuant to the provisions of section 2284 of title 28, United States Code." Pub. L. No. 104-104, § 561(a), 110 Stat. 56, 142 (1996). Section 2284 requires that at least one of the judges appointed to serve on the three-judge panel be a circuit judge.

[7] Pursuant to § 505(b), section 505 was set to go into effect on March 9, 1996, thirty days after it was signed into law by the President. Pub. L. No. 104-104, § 505(b), 110 Stat. 56, 136 (1996).

[8] Section 2284(b)(3) delineates the preliminary matters that may be decided by a single judge from those matters that must be decided by three-judge district courts. That section provides:

granted Playboy's motion on March 7, 1996, temporarily enjoining enforcement of § 505 until the matter could be heard by the three judge panel appointed by Chief Judge Sloviter. *Playboy Entertainment Group, Inc. v. United States,* 918 F. Supp. 813 (D. Del. 1996).

In preparation for our consideration of the plaintiffs' Application for a Preliminary Injunction, the parties negotiated a mutually acceptable discovery and briefing schedule. Much of the factual and technical evidence was presented by affidavits and briefs submitted prior to the preliminary injunction hearing. We heard testimony on May 20 and May 21, 1996, and closing arguments were presented on May 22. We concluded that we should delay our decision until after the Supreme Court's decision in *Alliance for Community Media v. F.C.C.,* 56 F.3d 105 (D.C. Cir. 1995). The Supreme Court published its decision on June 28, 1996, *sub nom., Denver Area Education Telecommunications Consortium v. F.C.C.,* 116 S. Ct. 2374 (1996). The parties then submitted supplemental memoranda, as we had instructed, on the impact and applicability of the Supreme Court's decision.

II.

FINDINGS OF FACT

In order to understand fully the arguments made by the parties in this case, it is necessary to understand the

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> A single judge may . . . grant a temporary restraining order on a specific finding, based on evidence

submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by

> the district court of three judges of an application for a preliminary injunction. A single judge shall not . . . hear and determine any application for a

preliminary or permanent injunction . . . . Any action of a single judge may be reviewed by the full court at anytime before final judgment.

28 U.S.C. § 2284.

technological workings of cable signals and transmission. During the preliminary injunction hearing, the court heard extensive and complex testimony regarding cable technology and the mechanisms available to comply with § 505. Pursuant to Federal Rule of Civil Procedure 52 (a), we make the following findings of fact:

The Statute At Issue

1. Playboy and Graff challenge § 505 of the CDA, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." This section requires a multisystem operator ("MSO")[9] to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming." Section 505 requires that any such adult channel or network be fully scrambled. The purpose of this scrambling is to eliminate "signal bleed." "Signal bleed" is the partial reception of video images and/or audio sounds on a scrambled channel. If an MSO does not or cannot comply with § 505's blocking requirement, the MSO is prohibited from transmitting the adult programming during hours of the day when minors are most likely to view it.[10]

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[9] Section 505 applies to "multichannel video programming distributors." These distributors are more simply known as "multisystem operators" or "MSOs" and we will refer to them in this manner.

[10] Section 505 provides:

> (a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
>
> (b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the

2. MSOs, such as Telecommunication, Inc. ("TCI") and Time Warner Cable, provide cable subscribers with various packages of cable channels for which subscribers pay a monthly fee. Some subscribers receive a "basic" package or "tier" of channels. A basic cable tier often includes local broadcast networks (like ABC, CBS, and NBC), leased and public access channels, as well as networks devoted entirely to news, education, fine arts, music videos, sports, or shopping. MSOs also provide "premium" tiers, which offer, in addition to the basic tier channels, channels showing recently released movies (like HBO, Cinemax, and Showtime) and channels dedicated solely to adult entertainment. MSOs charge a monthly fee for a basic cable package and additional monthly fees for premium cable channels.

3. Premium programming is also offered by MSOs on a "pay-per-view" basis. A pay-per-view consumer places an order with a cable operator, requesting access to a particular movie or sporting event. A consumer may also purchase programming on a premium channel for a specified period of time. When a consumer places a pay-per-view order, the MSO at the beginning of the requested program unscrambles the signal by remote accessing of a converter/descrambler box in the subscriber's home. The MSO rescrambles the signal at the conclusion of the program. The fee charged for receiving a program on a pay-per-view basis is always in addition to monthly fees paid for a cable package.

4. Playboy and Graff provide MSOs with adult, sexually oriented video programming. The MSOs then trans-

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day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION.—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (to be codified at 47 U.S.C. § 641).

mit the plaintiffs' programming to premium subscribers and pay-per-view purchasers who request access to such programming. Playboy owns two adult-programming networks: Playboy Television and AdulTVision. Graff also owns two adult networks: Adam & Eve and Spice. The programming on the Playboy and Graff networks is virtually 100% sexually explicit adult programming. In marketing its programming, Playboy relies on both premium subscription and pay-per-view sales, while Graff relies almost entirely on pay-per-view. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming.

5. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will, among other programs, transmit sexually explicit programs or programs which contain some sexually explicit scenes. We received evidence of the frequency of sexually explicit programming on non-adult channels. It was demonstrated for example that the number of sexually explicit programs available on non-adult channels on the evening of Friday, May 17, 1996, in Denver, Colorado, was one sixteenth that shown on the plaintiffs' adult channels. Moreover, unlike the adult channels, the sexually explicit programs on non-adult channels were mainly "R" rated movies which contained some sexually explicit scenes but were not continuously sexually explicit as was plaintiffs' programming.

6. MSOs receive signals from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "headend" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they own a cable-ready television, or by

attaching the cable to a converter box if they own a non-cable-ready television.[11]

7. Because the cost of premium and pay-per-view programming is in addition to the cost of basic programming, MSOs seek to secure premium network signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal by blocking a portion of it. Currently, most MSOs scramble premium channel signals using either "RF" or "baseband" technology. Generally, this scrambling affects only the video portion of the transmission.[12]

8. When a consumer decides to subscribe to a premium or pay-per-view channel, the MSO must descramble the channel for the new subscriber. This can be done either by installing a positive or negative trap in the coaxial cable leading to the new subscriber's home or by

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[11] A converter box sits on top of an older model television set which can receive only a finite number of VHF or UHF channels. The converter takes the cable signal and converts it to a channel which can be received by the subscriber's television set. When cable systems began to offer programming, other than local broadcast stations, on channels that television sets designed for broadcast reception were not capable of receiving, MSOs began to distribute these converter boxes to their subscribers. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box "converts" the selected channel to a frequency (typically broadcast television channel three or four) that the subscriber's TV set can receive and display.

In about 1980, TV set manufacturers began marketing "cable-ready" TV sets, units equipped with tuners capable of directly receiving cable programming transmitted on non-broadcast (cable only) frequencies. If a subscriber has a cable-ready TV set, and it is capable of tuning all the channels offered by the cable system, the subscriber's line can be connected directly to the TV set.

[12] Because RF affects only the picture portion of the television transmission, no audio scrambling occurs. Some baseband systems do include audio encryption so that no intelligible audio will be presented to the non-subscribing customers.

providing the new subscriber with an addressable converter. The trap or the addressable converter descrambles the signal so that the integrity of the image and/or the sound is restored in the set or sets attached to the descrambled line. The MSO can remotely "address" an addressable converter by sending out an electrical impulse. Addressable converters make pay-per-view requests possible by enabling an MSO by remote direction to descramble and then rescramble the cable signals entering the subscriber's home.[13]

9. As mentioned above, one of the technologies used by MSOs to secure premium channels is "positive trapping." For positive trapping, the MSO installs at its transmitter headend an electronic box which jams the signal of the channel to be secured. Non-subcribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to the cable-ready TV or to the set top converter box in order to filter out the jamming signal.

10. A premium channel's signal can also be secured by "negative trapping." Using this technology, the signal will be transmitted in the clear. A negative trap is installed at the homes of non-subscribers, jamming the signal there.

11. An MSO's choice between using positive or negative trapping will depend on whether the majority of subscribers to the overall cable service also wish to subscribe to a particular premium service. It is cost effective to use negative traps only when a large majority of the customers of a cable system subscribe to a particular premium channel.

12. The problem which § 505 was enacted to remedy is known as "signal bleed." Audio or video "bleed" occurs when a signal is not effectively scrambled by the

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[13] The previously described converter box and the addressable converter/descrambler can be combined in one set top box.

MSO's RF or baseband equipment. Bleeding does not occur in TV sets with converter boxes that have a feature known as channel mapping.[14] Cable-ready television sets, however, do not include this mapping feature. When a consumer with a cable-ready TV tunes to a scrambled premium channel to which the consumer does not subscribe, the consumer receives the jammed signal which under some circumstances includes a video picture or portions of a picture because of a phenomenon called random lockup. The nonsubscribing consumer will also receive a clear audio signal unless the MSO's scrambling system is one which scrambles the audio.[15] The severity of this signal bleeding problem varies from time to time and from place to place. The reason for these inconsistencies may be weather extremes, faulty or old equipment, or human error in installing, operating, and/or maintaining systems. Moreover, according to plaintiffs' expert, Dr. Walter Ciciora, the cable-ready TV's that pervade the market today have improved electronic circuitry which will make a discernible picture out of a partly-scrambled signal. This technology, developed over the past two decades, permits the child of a cable subscriber to tune the cable-ready TV to a premium or pay-per-view channel offered on the cable system and to receive discernible images even though the parent is a nonsubscriber to that channel.

13. With this incidence of improved electronic technology and/or partially scrambled signals, a nonsubscriber may see and hear portions of a channel or program to which he or she does not subscribe. This result is of particular concern when the programming is sexually explicit, intended for an adult-only audience.

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[14] When a consumer with a converter box attempts to tune a scrambled channel, the converter box will not tune that channel but will tune to another channel, providing either a promotional message or a blue screen.

[15] A subscriber will of course receive the descrambled video and audio.

Families, who do not subscribe to adult entertainment channels, have found that sounds and images from these channels are at least partially discernible. The government presented anecdotal evidence of parents discovering that their children have been exposed to sights and sounds from sexually explicit programming only after the exposure had occurred. This evidence included affidavits from several parents testifying about the danger in their homes of signal bleed from adult programming networks. Other parents complained that, even though their own sets were attached to lockboxes that fully blocked indecent programs, their children were exposed to signal bleed from adult programming when they visited friends. Anecdotal evidence of signal bleed was also presented in letters which had been sent to various members of Congress and were made part of the record before this court. In addition, video tapes of sexually explicit signal bleed were admitted into evidence. For instance, Defendant's Exhibit No. 4 was taped from the Playboy Channel in Orange, California. Exhibit No. 4 shows partially scrambled images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other. Defendant's Exhibit No. 5 is an audio tape of the Spice Channel, made by a non-Spice subscriber from the audio bleed. It carries the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans.

14. There are approximately 62 million households in the United States which receive cable television. Of these, 20 to 25 million have converter boxes to receive basic and/or premium cable service. These converter boxes will map out the scrambled channels and as a consequence these households will not receive "signal bleed." The other 40 million cable subscribers have the potential for a "bleed" problem. It is not clear how many of these 40 million cable homes with the potential for "signal bleed" will not in fact receive signal bleed either because the local MSO employs effective baseband or digital

scrambling or because the household is already a subscriber to the adult channels.[16] No evidence was presented of any consumer desire to receive "signal bleed." Moreover, plaintiffs make no claim that "signal bleed" itself is constitutionally protected.

Legislative History of § 505

15. On June 12, 1995, after hearings and substantial debate had been held regarding the legislation that was to become the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act. Their amendment proposed that MSOs, offering adult programming, should be required to completely scramble the audio and video signals to prevent partial reception of those channels in the homes of nonsubscribers.

16. Senator Feinstein told members of the Senate that "[p]arents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed." Cong. Rec. S8167; *see* Playboy Ex. 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inadequate because often nonsubscribers are unaware that indecent audio and/or video signals can be received. *Id.* The object of the amendment, she said, was to "protect[] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."

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[16] If at the trial on the permanent injunction more specific evidence of the number of households with the potential for signal bleed were to be presented, we would be in a better position to consider whether the standards for a permanent injunction have been met.

17. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Accompanying the transcript of their statements before the Senate was a memorandum from the American Law Division ("ALD") of the Congressional Research Service. The memorandum analyzed the Feinstein-Lott amendment in light of First Amendment case law and concluded that some language contained in the provision might be unconstitutional and over broad. *Id.* at S8168. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor; none opposed) and became § 505 of the bill that emerged from the conference which ironed out the differences between the House and Senate versions. On February 8, 1996, President Clinton signed the bill into law.

18. Section 505 does not eliminate adult programming. Instead, it offers MSOs either the option of fully scrambling the video and audio signals of adult programming or, if complete scrambling is not possible or is not the choice of the MSO, the option of transmitting adult programs only during the "safe harbor" hours. Specifically, pursuant to § 505(a), MSOs are required to "fully block the video and audio portion of [an adult entertainment] channel so that one not a subscriber to such channel or programming does not receive it." If an operator cannot fully block its adult channels, it must then, pursuant to § 505 (b), discontinue programming "during the hours of the day . . . when a significant number of children are likely to view it." The FCC regulation implementing this alternative would limit adult programming to the eight hour period between 10:00 p.m. and 6:00 a.m. We will refer to the requirement found in subsection (a) as "complete scrambling," and the alternative offered by subsection (b), as "time channeling."

The Technological and Economic Impacts of § 505

19. There are MSOs that already meet the requirements of § 505. For example, Steven Saril, Senior Vice President of Sales and Marketing for Graff, testified that roughly half of the systems carrying Graff programming are in compliance with § 505.[17] For the MSOs that are not in compliance, several technologies may become available in the future that would allow an MSO to meet the requirements of § 505. Television manufacturers may soon be required by law to insert the so-called "v-chip." in all new televisions. Pub. L. No. 104-104, § 551. 110 Stat. at 139-41. The v-chip will allow parents to block types of programming which they find inappropriate for their children. The v-chip is currently being tested in Canadian markets. It is not clear, however, how long it will be before televisions with v-chips become widely available in the United States.

20. Digital cable technology is another future option that will permit MSOs to completely scramble signals to nonsubscribers as § 505 requires. Approximately 2 million American consumers presently receive digital television service. Digital signals will prevent all audio and video bleeding, but digital service will require conversion of the MSOs' headend equipment from analog to digital technology. As MSOs adopt digital service, they will probably use it first for premium channels, including adult programming.

21. Because the currently used "RF" and "baseband" technologies are not capable of fully scrambling both the audio and video signal at all times, many MSOs would be required, if § 505(a) was enforced today, to resort to other and/or additional scrambling techniques. If an

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[17] Saril also testified that the Spice network might go out of business if the non-complying channels were required to time channel. The Graff "standard agreement," however, requires an MSO to carry Spice only during the hours of 9 p.m. to 3 a.m.—hours that are very close to the safe harbor time period.

MSO was not able or willing to initiate additional scrambling techniques, it would be required to time channel adult programming.

22. One device which has been available for several years and which succeeds in fully scrambling unwanted cable signals is the lockbox. Since the early 1980s, MSOs have been required by law to provide a lockbox to any customer upon request. Section 544(d) of the 1984 Cable Act requires that cable operators either sell or lease a blocking device to any subscriber who requests that a channel be completely blocked. *See* 47 U.S.C. § 544(d)(2)(A). However, few households have obtained the lockboxes made available by this provision.

23. Section 504 of the CDA also requires MSOs to completely block *upon request* any programming that a cable customer finds personally offensive. This blocking requirement is not limited to the "sexually explicit adult video service programming" which is the target of § 505. Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996). Moreover, under § 504, the MSO, rather than the subscriber, is responsible for bearing the cost of providing the blocking mechanism.[18] Despite this economic burden, plaintiffs suggest that § 504 presents a constitutional, "less restrictive alternative" because it would require an MSO to provide complete blocking only upon request. Plaintiffs also assert that cable subscribers can be alerted through public relations efforts that blocking devices will be made available to them, free of charge, upon request. Methods of disseminating this information could include

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[18] Section 504(a) provides:

> (a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, *without charge*, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996) (emphasis added).

inserts in program guides and bills, informative screens shown on "barker channels", advertisements run on other channels, and special mailings. We have not, however, received evidence that MSOs are advising cable customers of the availability of the free channel blocks under § 504. Nor is there evidence that customers are responding to such notices, if given. Thus, we cannot effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed. If the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us.

24. MSOs that adopted the lockbox remedy, in order to comply with § 505, would be required to provide *all* nonsubscribers with a lockbox programmed to block the audio and video signals of adult entertainment networks. A mapping converter with a lockbox feature allows parents to control when adult programming will be received and when it will be blocked. Most lockboxes currently available are capable of blocking only signals entering the televsion set to which the box is attached. In order to fully block access to sexually oriented programming at all times, each cable-connected TV set in the home would have to be connected to a lockbox. A single converter/lockbox costs approximately $115. If MSOs that offer adult programming were to distribute one converter/lockbox to every nonsubscribing household currently without one, the total cost would be prohibitive, probably in excess of one billion dollars.

25. In the alternative, MSOs could provide "negative traps" to nonsubscribers. A "negative trap" is installed on the cable wiring of non-subscribing households and scrambles a clear signal. Subscribers to adult channels receive the clear signal without the negative trap. Negative trapping costs between $12 and $15 per household.

It is an economically feasible solution only in areas, such as military bases, where a large majority of cable subscribers want to receive the adult channel.

26. Double scrambling with "positive trap" technology provides the most workable alternative for non-complying MSOs. To achieve double scrambling, RF or baseband scrambling is combined with a jamming signal at the headend. The headend jamming completely blocks video and audio so that no signal bleed occurs in the homes of non-subscribers. In order for a subscriber to view programming that has been double scrambled, the subscriber needs both a positive trap and an addressable converter. The positive trap filters out the interference from the jamming signal, and the addressable converter descrambles the RF or baseband scrambling. The addressable converter can be used to start up and end periods of premium service and also to permit pay-per-view reception. Positive trap technology would be economically advantageous in areas where nonsubscribers outnumber subscribers. If the positive trapping alternative were adopted by an MSO, positive traps would be delivered to or installed at all households subscribing to adult programming. The average cost of a positive trap is $7. A positive trap is easily installed by the subscriber or it can be installed by the MSO at a cost of approximately $35. The cost of the additional equipment necessary for jamming at the MSO's headend is estimated to be $750 to $1,000.

27. Positive trapping technology poses an additional problem for pay-per-view purchases. Customers either have to pick up a positive trap or order it in advance of viewing the desired program. This interferes with the spontaneous nature of what plaintiffs consider to be the impulse purchasing of sexually explicit adult programming.

28. Professional installation of traps also raises privacy concerns. A subscriber, who enjoys adult entertainment at home, might be dissuaded from requesting a posi-

tive trap upon realizing that the MSO will learn his or her identity. The new subscriber will be identified as a consumer of sexually explicit material—although with sexually explicit premium and pay-per-view programming, the subscriber will also be identifiable through billing for the programming.

29. A few MSOs have already adopted "double scrambling" to resolve community opposition to sexually explicit programming and to the audio and/or video bleeding of signals from such programming. Plaintiffs contend that in these double-scrambling communities revenues from adult channels has fallen by fifty per cent. Plaintiffs are of the opinion that a significant factor causing this drop in revenue is the impulse nature of the purchase of adult programming.

30. Finally, an MSO has the option of complying with § 505 by "time channeling" as provided in subsection (b). If an MSO cannot or chooses not to completely scramble audio and/or video signals as required by § 505(a), it must restrict adult program to certain "safe harbor" hours. In preparation for implementing § 505, the FCC established a regulation that defines the safe harbor hours as the eight hour period between 10:00 p.m. and 6:00 a.m. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6 (released March 5, 1996; intended to become effective March 9, 1996). If time channeling were adopted by an MSO, adult cable programming would not be available in the MSO's service area except during the safe harbor hours. Plaintiffs estimate that their revenues would fall approximately thirty per cent if time channeling were adopted.[10]

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[10] We are skeptical of plaintiffs' estimate of revenue loss. It appears to be significantly overstated. Although Graff's Vice President, Steven Saril, stated that 30 percent of those who purchase his company's programming do so outside the safe harbor hours, many of these customers may not be affected by time channeling

31. The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling.

III.

CONCLUSIONS OF LAW

A. The Preliminary Injunction Standard

Playboy and Graff have asked this court to exercise extraordinary judicial authority by striking down a law drafted and adopted by a co-equal branch of government. The plaintiffs' request raises one of the judiciary's most "awesome responsibilit[ies] calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964). After thorough examination and discussion, we conclude that, at this preliminary injunction stage, we will not strike down § 505. As the case has presently been developed before us, the plaintiffs have not met the requirements for the issuing of a preliminary injunction. We will, therefore, deny their petition for preliminary relief.

The standard used to determine whether plaintiffs are entitled to a preliminary injunction is well established. In order to succeed, plaintiffs must demonstrate that they are likely to prevail on the merits and that they will suffer irreparable harm if they are not granted injunctive relief.

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because half of the cable systems, carrying Graff channels, already comply with § 505(a). The customers of these MSOs will still be able to view Graff's channels outside the safe harbor period. Moreover, Saril admitted on cross-examination that 21% of the non-safe-harbor purchases occur at 9:00 or 9:30 p.m., and that a 10:00 p.m. starting time would cause no loss of revenue. He further admitted that people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours, again preserving Graff's revenues. Finally, plaintiffs acknowledge some remaining elasticity in the pricing of sexually explicit programming. Graff would be able raise its rates a certain extent without losing customers.

We must also consider whether the potential harm to the defendant that will result from the issuing of a preliminary injunction outweighs the harm that may fall upon the plaintiffs if such relief is denied, and whether granting the requested injunctive relief is in the public interest. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citing *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992) and *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990)); *see also Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995).

In a case such as this one, in which the alleged injury is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. *American Civil Liberties Union*, 929 F.Supp. at 851 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). The loss of First Amendment freedoms is unquestionably irreparable injury. *Elrod*, 427 U.S. at 373 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). Conversely, however, if the only irreparable injury alleged is the loss of first amendment freedoms, the likelihood that plaintiffs will not succeed on the merits creates an equal likelihood that they will not suffer First Amendment injury.[20] Constitutional injury cannot occur if there is not a constitutional violation. We will, for this reason, turn our inquiry first to the issue of the plaintiffs' likelihood of success on the merits.

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[20] Plaintiffs also claim that they will suffer financial loss. Financial loss is not, however, the type of irreparable injury that warrants the granting of injunctive relief. *See, e.g., In re Arthur Treacher's Franchisee Litigation*, 699 F.2d 1137, 1145 (3d Cir. 1982). To the extent that plaintiffs may suffer financial loss for which they will not be reimbursed, that economic burden is an element which we considered *infra* in the balancing of harms, particularly in our discussion of the benefit to the public of time channeling (per *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978)) and its availability under § 505 as an alternative to complete scrambling.

Plaintiffs challenge § 505 on grounds that it (1) infringes the free speech protections provided by the First Amendment of the U.S. Constitution, (2) violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and (3) contains unconstitutionally vague terminology. With regard to all three of these claims, we conclude that Playboy and Graff have failed to meet the preliminary injunction test. They have not persuaded us that they are likely to prevail on the merits if any of these three claims are ultimately litigated. Moreover, they have not demonstrated that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images and in view of the continuing availability under § 505 of sexually explicit adult programming during the safe harbor hours.[21]

B. First Amendment Jurisprudence

Playboy and Graff claim that § 505 burdens their rights guaranteed under the First Amendment by inhibiting their freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has been exacting in its protection of this First Amendment right. Moreover, as circumstances and technologies have changed, the Court has adapted free speech protection to meet these changes.

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[21] In our discussion, we do not separate out the elements to consider with regard to the issuing of an injunction, *i.e.*, likelihood of success on the merits, irreparable harm, balancing of harms, and public interest. First, in this context of a claim of unconstitutional restriction of free speech, the harm and public interest elements are important factors in determining the likelihood of success on the merits. These factors will therefore be discussed in conjunction with the merits of the claims. Second, as we note above, our irreparable harm analysis is subsumed by our finding that plaintiffs are not likely to succeed on the merits.

We postponed our decision here until the Supreme Court reached its decision in a case dealing with a similar field of developing technology—that of leased and public access cable channels. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 116 S.Ct. 2374 (1996) [hereinafter *Denver Consortium*]. In *Denver Consortium*, the plaintiffs challenged three sections of the Cable Television Consumer Protection and Competition Act of 1992, which placed restrictions upon indecent programming aired on leased and public access cable channels.[22] Pub. L. No. 102-385, 106 Stat. 1460, 1486, §§ 10(a), 10(b), and 10(c) (codified at 47 U.S.C.

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[22] The plaintiffs in *Denver Consortium* challenged sections 10(a), 10(b), and 10(c) of the 1992 Cable Act. These provisions were to be applied to "leased access channels" and "public, educational, or governmental channels" ("PEG channels"). Section 10(a) "permit[s] a cable operator to enforce prospectively a written and published policy of prohibiting programming [on leased access channels] that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Cable Act, § 10(a)(2).

Section 10(b) requires that, if cable operators choose not to ban sexually explicit programming as permitted under § 10(a), when they broadcast such programming on leased access channels, they must completely segregate and block the signal carrying the indecent programming. 1992 Cable Act, § 10(b). According to regulations promulgated pursuant to § 10(b), leased access programmers must inform cable operators if their programming will be indecent, and cable operators must then place that programming on a single channel. 47 C.F.R. § 76.701(d) (1995). The signal of this single channel must be completely blocked by the cable operator, and unscrambled only upon the written request of an adult subscriber. *Id.* at § 76.701(b). Upon receiving a subscriber's request, the operator must provide access to the blocked channel within thirty days and, if that subscriber later asks that the channel be re-blocked, the operator must accommodate the subscribers request, again within 30 days. *Id.* at § 76.701(c).

Section 10(c) is similar to § 10(a) but applies only to PEG channels. It instructs the F.C.C. to enact regulations that would permit a cable operator "to prohibit the use, on [a cable system],

§§ 532(h), 532(j), and note following § 531) ("the 1992 Cable Act"). A majority of the Supreme Court agreed that § 10(b) of the 1992 Cable Act was unconstitutional, but the Court was unable to form a majority regarding the constitutionality of the remainder of the Act.[23]

Justice Breyer wrote for the Court regarding § 10(b), but thereafter he wrote for a plurality, which upheld § 10 (a) and struck down § 10(c). One of the seemingly unresolved aspects of *Denver Consortium* is the standard of scrutiny we should apply in our analysis here. The plurality suggested that it was "unwise and unnecessary" to decide whether a lower standard of scrutiny, such as that applied in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), should apply in the cable context. *Denver Consortium*, 116 S. Ct. at 2385. It was unecessary to specify a specific standard because § 10(b) could not pass constitutional muster either under strict scrutiny or under a less rigorous standard. And, it was unwise to declare a "rigid single standard" for fear of dampening the rapid rate of development in the field of communications technologies.

The other five members of the Court suggested that strict scrutiny remained the applicable standard where a law restricted speech on the basis of its content. Thus, these members of the Court would have required that the law be "narrowly tailored" to achieve a "compelling" government interest in order to survive constitutional review.

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of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit, conduct, or material soliciting or promoting unlawful conduct." 1992 Cable Act, § 10(c).

[23] Unlike leased and public access channels, the Graff and Playboy networks are commercial premium channels. The segregation of adult programming and the scrambling of adult channel signals, which concerned the Court in *Denver Consortium*, is, in the context of adult channels, a commercial decision which MSOs have made in order to limit access to those viewers who pay to subscribe to the adult channels.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia believed that all three challenged provisions of the 1992 Cable Act were constitutional and that even § 10(b) would survive strict scrutiny. *See id.* at 2422, 2428-29 & 2432 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have held to the contrary that strict scrutiny was fatal to the challenged provisions and all three should be struck down. *See id.* at 2405-07, 2416-17, & 2419 (Kennedy, J., concurring in part and dissenting in part). In the aftermath of the *Denver Consortium* decision, it is clear only that we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged on grounds that it violates the First Amendment.[24]

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[24] We recognize that several Supreme Court pluralities have suggested that sexually explicit material receives less protection under the First Amendment than, for example, artistically, politically, or scientifically valued forms of speech. For example, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a plurality of the Court explained:

> [E]ven though we recognize the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment ["I disapprove of what you say, but I will defend to the death your right to say it."]. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification . . . .

Id. at 70-71. This plurality also noted that "[e]ven within the area of protected speech, a difference in content may require a

However, whatever the standard of scrutiny, as Justice Breyer stated for the Court in *Denver Consortium*: "The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required" *Id.* at 2384.

The first step that the majority took in *Denver Consortium* was to scrutinize the statute to assure that it properly addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. *Id.* at 2385. The Court defined the problem as the protection of children from exposure to patently offensive depictions of sex. *Id.* It was to address this same problem that Congress enacted § 505.

Section 505 differs, however, from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulation of speech in that the target of § 505 is not the speech itself, *i.e.*, sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech. Moreover, § 505 is directed at this secondary effect because signal bleed is intruding into the homes of television viewers who have chosen *not* to receive the underlying sexually explicit programming.

This focus of § 505 on a secondary effect of speech leads us to our next inquiry, whether § 505 is "content-based" or "content-neutral." *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). As we have noted, in *Denver Consortium* five justices agreed that a content-based strict scrutiny standard should apply. We conclude here, but not without considerable deliberation,

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different governmental response." *Id.* at 66. The plurality opinion in *Pacifica Foundation* similarly suggested that a lower standard of scrutiny may be appropriately applied in certain contexts when the content of the regulated material is offensive, vulgar, or shocking. *See Pacifica Foundation*, 438 U.S. at 744-48.

that § 505 should be treated as a content-based restriction on speech. Even though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of "sexually explicit adult programming or other programming that is indecent." It does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel. Thus, Congress targeted signal bleed based on its sexually explicit content, rendering § 505 a "content-based" restriction. We will therefore apply content-based analysis.

We must, however, also consider content in context. We cannot ignore the fact that the households that receive signal bleed have not subscribed to the adult channel which transmits the unwanted images and sounds. Nor can we ignore the fact that cable television is a means of communication which is pervasive and to which children are easily exposed. The Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so. *See Denver Consortium*, 116 S.Ct. at 2386.

Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium. *See Denver Consortium*, 116 S. Ct. at 2386 ("[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material."); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need

for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (citation omitted)); *Fabulous Assocs. Inc. v. Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990) ("There is little question that the interest of the state in shielding its youth from exposure to indecent materials is a compelling state interest.").

Nor are the courts alone in finding that children should be protected from exposure to sexually explicit materials. In 1986, the Attorney General's Commission on Pornography issued a final report that reached similar conclusions regarding the effects of "non-violent and non-degrading," sexually explicit materials on children. The Commission explained:

> Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. . . . We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child's introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.
>
> We have little doubt that much of this material does find its way into the hands of children and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we agree about the question of the desirability of exposing children to most of this material, and on that our unanimous agreement is that it is undesirable.

U.S. Dept. of Justice, *Attorney General's Commission on Pornography*, July 1986, at 343-44 (Def.'s Ex. 80).[25]

As a result, we conclude that § 505 clearly addresses a recognized "compelling interest," and it remains only for us to determine whether the provision is carefully tailored to serve that end. For the reasons that we now develop, and particularly on the basis of the Supreme Court's ruling in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), we hold that Congress has adopted, at least in respect to § 505(b), a carefully tailored, and constitutional, solution.[26]

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[25] In considering harm to children, we have not relied on the study conducted by Government's expert witness, Dr. Diana M. Elliott, Ph.D. *See* Diana M. Elliott, *Children's Exposure to Pornography: Prevalence and Impact* (Def.'s Ex. 79). We understand, as she testified, that it would be unethical to expose children to pornography in order to test their reactions to sexually explicit material, but, for a number of reasons, we have concerns regarding the reliability of her methods and conclusions. Her results strike us as anecdotal and possibly misleading. Because the parties stipulated prior to the preliminary injunction hearing that all evidence submitted would be admissible, we did not consider the admissibility of her study under the rules established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) and *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 s. Ct. 1253 (1995). Instead, the reliability concerns that the court had regarding Dr. Elliott's research were considered only in weighing the evidence. We ultimately decided that her research should not be given weight in coming to our present decision.

If plaintiffs plan to seek a hearing in order to request a permanent injunction before this panel, it would be helpful if the parties would provide the court with additional evidence demonstrating the effects of sexually explicit materials on children.

[26] The Supreme Court held in an earlier "secondary effects" decision, regarding the exposure of the unwiling viewer to nudity, that a city ordinance was invalid which barred the exhibition in drive-in theaters of motion pictures in which human male or female bare buttocks, human female bare breasts, or human bare pubic areas were shown if the motion picture was visible from any public street or public place. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). We find the present case distinguishable from

In *Denver Consortium*, a plurality of the Supreme Court acknowledged that case's similarity to *Pacifica Foundation*, noting that, like the broadcast system at issue in *Pacifica Foundation*, "[c]able television systems . . . 'have established a uniquely pervasive presence in the lives of all Americans.' " *Denver Consortium*, 116 S. Ct. at 2386 (quoting *Pacifica Foundation*, 438 U.S. at 748). It was largely the pervasive nature of broadcast media that motivated the Court in *Pacifica Foundation* to uphold governmental restrictions placed on radio broadcasts of indecent material.

We wholeheartedly agree with the plurality's finding in *Denver Consortium* that cable television is now "uniquely pervasive." *Id.* The plurality also noted that "[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting if not more so." *Id.* Justice Souter further explained:

> [W]hile we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion* [*Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969)], *see Turner Broadcasting System, Inc. v. F.C.C.*, [114 S. Ct. 2445, 2456-57 (1994)] (finding that *Red Lion*'s spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility

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Erznoznik **in that it is not an occasional glimpse of a portion of nude anatomy which is visible in the signal bleed from adult channels, but instead it is an unbroken continuum of sexually explicit sounds and images, delivered without invitation to one's home rather than to passers-by on a public highway. We believe it is likely that if the Jacksonville ordinance at issue in *Erznoznik* had been directed solely at the display of 100% sexually explicit films which were visible from the public street and from private homes, the ordinance would have been held to be valid.**

> to children, are also present in the case of cable television.

Id. at 2401-02 (Souter, J., concurring) (citation omitted).

There is no question that a commanding majority of households in this nation subscribe to cable programming. As a result of imperfect signal scrambling, millions of children then have potential access not only to indecent sounds, similar to those raising concern in *Pacifica Foundation*, but also to sexually explicit visual images. In the homes of families who do not subscribe to sex-dedicated networks, these images enter as an offensive pollutant. They invade the household and "confront[] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 748; *see also Denver Consortium*, 116 S. Ct. at 2386 (plurality opinion).

In *Pacifica Foundation*, the Supreme Court found it undisputed that George Carlin's "Filthy Words" monologue was "vulgar," "offensive," and "shocking." 438 U.S. at 747. The Court noted that, in the right context, the speech deserved First Amendment protections, providing adult listeners with a right to find Carlin's observances funny and provocative, instead of vulgar and offensive. The Court therefore examined the context of the monologue, broadcast at 2 o'clock in the afternoon. It emphasized the ubiquitous nature of broadcast radio and recognized that airing Carlin's performance at the time "could have enlarged a child's vocabulary in an instant." *Id.* at 749.

Similarly, when cable signal bleed occurs, children may be exposed to the sights and sounds of sexually explicit films and other adult programming. Such programming has the potential to affect not only a child's vocabulary, but also his or her capacity for inappropriate conduct that is sexual in nature. We believe that the danger of pre-

maturely exposing children to video and audio transmissions of graphic adult sexual behavior is even more troublesome than the exposure to offensive language that was at issue in *Pacifica Foundation*.

Indeed, the parties do not dispute that the government has a well-established compelling interest in protecting children from unsupervised exposure to sexually explicit material.

We then turn to the solution which Congress crafted in § 505. Congress provided MSOs with two alternative methods of compliance with the section: (1) complete scrambling, or (2) time-channeling the programming into safe-harbor hours. Playboy and Graff argue that very few MSOs will be financially able to comply with § 505 by distributing expensive equipment that will fully scramble the signals of sex-dedicated networks as required by subsection (a). Plaintiffs fear that MSOs will drop adult programming entirely, rather than invest in technologies which will be made obsolete by the v-chip or that MSOs will transmit plaintiffs' networks for an unprofitably short eight-hour period. Not only do the plaintiffs foresee lost profits, they present the possiblity of bankruptcy caused by implementation of § 505.

There is undoubtedly a substantial expense involved in complying with subsection (a). However, while an economic burden may warrant consideration when weighing the relative harms imposed by a law, economics alone cannot dictate the result where constitutional rights are at issue. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell concurring); *Mitchell v. Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 144 (3d Cir. 1993).[27] Moreover, § 505 does *not*

[27] While we are aware that *Young* and *Mitchell* are zoning cases, we consider that their holdings on economic impact are relevant in that, as is the statute at issue in this case, the regulations there were directed at competing concerns of public welfare rather than at the speech itself.

require that MSOs shoulder potentially fatal economic burdens. If the economic hardship imposed by subsection (a) is too severe, an MSO is free to choose to comply with § 505 by time-channeling in accordance with subsection (b).

By including the time-channeling compliance option in § 505, Congress provided MSOs with decision-making flexibility and an economically less restrictive alternative. We thus find that the economic burden placed on MSOs by subsection (a) is not determinative of the result in light of the substantially less expensive option provided by time-channeling in subsection (b). It follows therefore that if the time-channeling alternative provides a constitutional means of compliance with § 505, then § 505 is constitutional.

Time-channeling was explicitly approved by the Supreme Court as a constitutional restriction on pervasive indecent speech in *Pacifica Foundation*. There, the Supreme Court found that one of the most troubling aspects of the Carlin broadcast was the early afternoon hour at which it was aired. Shown at that time, the broadcast was " 'like a pig in a parlor instead of the barnyard.' " *Pacifica Foundation*, 438 U.S. at 750 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)). The F.C.C. opinion challenged by the Pacifica Foundation did not intend to ban future indecent broadcasts entirely but merely sought to channel them into a safe-harbor period during which significant numbers of children would not be listening. *Id.* at 732 (citing 59 F.C.C.2d 892 (1976)). The Supreme Court held that time-channeling was an appropriate response to the problem presented. It therefore approved the F.C.C. attempt to prevent the airing of offensive programming on a pervasive form of communication at a time of day when children were likely to be listening.

Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foun-*

dation, we believe that time-channeling also survives constitutional scrutiny here. It is important to our reasoning that § 505 does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire. It is clearly established that a complete ban on indecent speech will rarely (if ever) be tolerated. *See Denver Consortium*, 116 S. Ct. at 2387 (plurality opinion) (suggesting that § 10(a) passed constitutional muster in part because it gave a cable operator the flexibility to choose not to ban indecent broadcasts, but rather "to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children); *id.* at 2423 (Thomas, J., concurring in part and dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming."); *Sable Communications*, 492 U.S. at 127 (holding total ban on indecent telephone communications to be unconstitutional and distinguishing the time-channeling remedy approved in *Pacifica Foundation* on grounds that it "did not involve a total ban on broadcasting indecent material."); *Young*, 427 U.S. at 70 (finding that the First Amendment protects communication in the area of sexually oriented materials from total suppression). The time-channeling alternative in § 505 explicitly allows MSOs to continue transmitting sex-dedicated networks. Section 505 thus leaves the speaker and the listener with an opportunity to maintain sufficient adult communication, while respecting the privacy interests of those who might be offended or inappropriately exposed. We believe the law thus strikes a permissible balance of constitutional interests.

The plaintiffs contend, nevertheless, that § 504 is a less restrictive option which is available to provide protection from signal bleed. They urge, therefore, that we declare § 505 invalid. However, the cost to MSOs of creating an adequate shield from a widespread instrusion

of signal bleed by supplying converter/lockboxes to households that don't subscribe to adult channels, would be close to the expense of providing converter/lockboxes to non-subscribing households under § 505(a). The main difference is that under § 504 the household has to request the box, while under § 505 the MSO must provide the box.[28] We have no evidence in the present record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. Upon this record, the government has demonstrated an expectation that § 504 will not be a viable alternative.

Moreover, in view of the fact that children watch television in the homes of their friends as well as in their own homes, we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home.

Furthermore, Congress enacted, as one of the regulatory options, time channeling, which the Supreme Court had in *Pacifica Foundaiton* held to be a constitutionally acceptable way of protecting children from a pervasive,

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[28] Plaintiffs also asert that Congress found, in § 551(a)(8) & (9) of the Act, that there is a compelling governmental interest in empowering parents to control the televison viewing by their children, such as by providing parents with technological tools that allow them to easily block violent, sexual or other programming that they believe harmful to their children. Section 504 was one such mechanism, and the development of v-chip technology will be another. Congress recognized, as Senator Feinstein's remarks indicated, *supra*, that many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children of non-subscribers of sexually-dedicated channels. The parental control option is viewed as an adjunct of lesser efficacy because its exercise requires knowledge and the taking of affirmative steps such as requesting the blocking device from the MSO.

sexually explicit medium. Therefore, even if § 505(a) does not pass constitutional analysis, § 505(b) does.

Given the content of adult programming and the pervasive nature of cable television, we find that § 505 is an acceptable governmental response intended to prevent exposure of minors to sexually explicit signal bleed. We therefore conclude that plaintiffs have failed to show that they are likely to succeed in their claim that the provision violates their First Amendment rights to freedom of speech.[29]

C. Fourteenth Amendment Equal Protection Jurisprudence

Likewise, plaintiffs have not persuaded us that they can succeed on the merits of their claim that § 505 violates their rights guaranteed by the Equal Protection Clause. Playboy and Graff argue that other premium channel networks carry adult-oriented programming but that § 505 will not restrict the speech of these networks. They claim, for example, that HBO and Showtime present programming that is an equivalent to the sexually oriented programming shown on the Playboy networks and on Spice, and that this programming is shown at hours outside of the safe-harbor period. They assert that legislation directed at them, but not at these other premium networks, denies them equal protection of the laws. *See, e.g., News America Pub., Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens.") (citing *Railway Express Agency v. New York*, 336 U.S. 106 (1949)).

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[29] We are mindful that the Supreme Court in *Denver Consortium* referred to the Telecommunications Act of 1996, including specifically § 505, as "significantly less restrictive" than § 10(b) of the 1992 Cable Act which they struck down. *See, e.g.*, 116 S.Ct. at 2392. However, since § 505 was not before the Court in *Denver Consortium*, this reference is dictum.

There is, however, a significant difference between plaintiffs' networks and the non-adult premium networks. The plaintiffs admit that *all* of the programming shown on their networks—in some cases, twenty-four hours per day—is "adult programming." Transcript of Preliminary Injunction Hearing 201-02 (D. Del. May 20, 1996) (testimony of Steven Saril, Senior Vice President of Sales and Marketing for Graff); *see* Deposition of Anthony J. Lynn, President of Playboy Entertainment Group, Inc. at 124-25 (Def.'s Ex. 72) (stating that sexually explicit programming aired on AdulTVision "is at risk of being defined as sexually explicit" under § 505); Plaintiff Graff Pay-Per-View Inc.'s Answers to Defendants' First Set of Interrogs. at 6 (Def.'s Ex. 43) (responding that 100% of Graff's programming contains material that is "sexually oriented"). On the premium channels, however, sexually explicit shows constitute only a fraction of the programming. For example, only one sixteenth of the programming on the non-adult cable channels on a Friday evening in Denver was sexually explicit. Moreover, many of the shows constituting that one-sixteenth were "R" rated movies with some sexually explicit scenes, rather than being 100% sexually explicit. Thus, it cannot be said that the non-adult channels, such as HBO and Showtime, are "primarily dedicated" to sexually explicit programming. Moreover, signal bleed from that one-sixteenth, if signal bleed occurred, would not continuously present sexually explicit scenes to the channel surfer.[30]

We find therefore that Congress was justified in initially addressing the problem of sexually explicit signal bleed by focusing on sex-dedicated networks. Section 505's "differential treatment" of plaintiffs' networks is justified by their "special characteristic" of providing nothing but

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[30] We note also that § 505 applies uniformly and without blatant discrimination to all networks that are "*primarily* dedicated to sexually-oriented programming." Pub. L. No. 104-104, § 505, 106 Stat. at *136 (1996) (emphasis added). The law does not, for instance, favor Playboy over Graff.

sexually explicit programming intended for adult audiences. *See Turner Broadcasting*, 114 S. Ct. at 2468. It is perfectly logical that Congress would begin its attempt to prevent minors from gaining access to programming intended solely for adults by focusing first on the networks that specialize in adult-only programming. "Congress need not deal with every problem at once," and Congress "must have a degree of leeway in tailoring means to ends." *Denver Consortium*, 116 S. Ct. at 2393 (majority opinion) (citing *cf. Semler v. Oregon Bd. Of Dental Examiners*, 294 U.S. 608, 610 (1935) and *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973)); *see also Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (The Court does not "require that the Government make progress on every front before it can make progress on any front.").

We find that the means chosen by Congress to protect children and aid their parents was a permitted and measured response to a national problem. The cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks.[21] Congress thus made a logical distinction and tailored the law

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[21] Furthermore, this is not a case involving governmental discrimination against a suspect class, nor is there any evidence of arbitrary or invidious governmental conduct. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 592-93 (1979). Therefore, we apply rational basis review and ask whether the alleged classification is "rationally related" to a "legitimate" government interest. In our discussion of First Amendment jurisprudence, *supra*, we applied a much higher standard of scrutiny and concluded that § 505 is constitutional. We therefore hold that § 505 is not merely rationally related to a legitimate government interest, it is carefully tailored to an interest that is widely regarded as compelling.

in an acceptable manner. As a result, plaintiffs' claim that § 505 will violate their right to equal protection of the laws is likely to fail.

D. Vagueness Jurisprudence

After the Supreme Court's decision in *Denver Consortium*, it is clear that plaintiffs' vagueness claim will also fail on the merits. Graff noted in its Memorandum of Law in support of its Motion for a Preliminary Injunction that "the Supreme Court has before it a similar vagueness challenge in the cable indecency case," citing *Denver Consortium*. At that time, argument had been heard by the Supreme Court in *Denver Consortium*, but the decision was pending. When the Supreme Court published its decision in that case, it flatly rejected the plaintiffs' argument that the provisions challenged were unconstitutionally vague. *Denver Consortium*, 116 S. Ct. at 2389-90. The Court concluded that similar terms had been previously defined by courts and by the F.C.C. It also found the language of the statute "similar to language previously used by this Court for roughly similar purposes," referring to its decision in *Miller v. California*, 413 U.S. 15, 24 (1973), among others. *Id.* at 2389. Thus, the use of accepted terms imbued the statute with meaning.

In recent decisions, other members of the federal judiciary have likewise found that the term "indecent" has, over time, been sufficiently defined. *See American Civil Liberties Union v. Reno*, 929 F. Supp. at 865, 868 (Dalzell, J., concurring); *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 935-36 (S.D.N.Y., 1996). As pointed out recently by a three-judge panel in the United States District Court for the Southern District of New York, federal courts have approved the F.C.C.'s definition of "indecency" and have rejected vagueness challenges to that term in the context of broadcast media, commercial telephone communications, and cable pro-

gramming. *See Shea*, 930 F. Supp. at 935-36. The court in *Shea* comprehensively reviewed the precedent in this area, and we find their research and their reasoning persuasive.

Therefore, we conclude that § 505 does not suffer from the "vice of vagueness." The plaintiffs clearly understood that the law applied to them, and in the wake of this litigation, it is clear that the F.C.C. would apply § 505 to MSOs that carry the plaintiffs' networks. Thus, the meaning and application of § 505 should be plain to MSOs as well. Playboy and Graff have little-to-no chance of succeeding on the merits of a vagueness claim.

VI. CONCLUSION

Plaintiffs have not satisfied the elements of the preliminary injunction test. We will therefore remove the temporary restraining order, which was previously granted by this court, and we will deny plaintiffs request for preliminary injunctive relief.

APPENDIX B

[Filed Nov. 8, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 96-94 & 96-107-JJF
Consolidated

PLAYBOY ENTERTAINMENT GROUP, INC. and
GRAFF-PAY-PER-VIEW INC.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, JANET RENO, ATTORNEY GENERAL, and THE FEDERAL COMMUNICATIONS COMMISSION,
Defendants.

ORDER

This 8th day of November, 1996, for the reasons stated in the Opinion filed today, it is ORDERED that the plaintiffs' petitions for a preliminary injunction are denied.

/s/ Jane R. Roth
JANE R. ROTH
United States Circuit Judge

APPENDIX C

[Filed Nov. 8, 1996]

IN THE UNITED STATES DISTRICT COURT FOR THE DISRICT OF DELAWARE

Civil Action Nos. 96-94/96-107-JJF
Consolidated Actions

PLAYBOY ENTERTAINMENT GROUP, INC., *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that plaintiff Playboy Entertainment Group, Inc. hereby appeals, pursuant to Section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 143, and 28 U.S.C. § 1253, to the United States Supreme Court from an Order entered in this action on the 8th day of November, 1996, denying Playboy Entertainment Group, Inc.'s Motion for a Preliminary Injunction in Civil Action Nos. 96-94/96-107-JJF (Consolidated Actions).

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APPENDIX D

Communications Decency Act of 1996:

Section 504. Scrambling of cable channels for non-subscribers.

(3) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

(b) DEFINITION.—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

* * * *

Section 505. Scrambling of sexually explicit adult video service programming.

(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION.—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

Nos. 96-1034 and 96-1108

In the Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

SPICE ENTERTAINMENT COMPANIES, INC., APPELLANT

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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QUESTION PRESENTED

Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 505, 110 Stat. 136 (1996), requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it."

The question presented is whether the district court abused its discretion in refusing to grant appellants a preliminary injunction precluding implementation and enforcement of Section 505.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1034

PLAYBOY ENTERTAINMENT GROUP, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 96-1108

SPICE ENTERTAINMENT COMPANIES, INC., APPELLANT

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

OPINIONS BELOW

The opinion of the district court denying a preliminary injunction (J.S. App. 1a-40a)[1] is reported at 945 F. Supp. 772. A previous opinion of the district court

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[1] References to "J.S. App." are to the Appendix to the Jurisdictional Statement in No. 96-1034.

granting a temporary restraining order is reported at 918 F. Supp. 813.

JURISDICTION

The order of the district court denying a preliminary injunction was entered on November 8, 1996. The notice of appeal in No. 96-1034 was filed on November 8, 1996. The notice of appeal in No. 96-1108 was filed on November 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

Appellants are firms that provide "virtually 100% sexually explicit" programming (J.S. App. 8a) for transmission by cable operators (also referred to as "multisystem operators" or "MSOs") to premium subscribers who seek such programming. They sought a preliminary injunction, as well as permanent declaratory and injunctive relief, against the implementation and enforcement of Section 505 of the Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136. That statute requires cable operators carrying cable channels "primarily dedicated to sexually-oriented programming," *ibid.*, to take steps to ensure that those who do *not* subscribe to those channels will not receive intelligible audio or video signals from those channels at a time when children are likely to be viewing. The cable operator either must make intelligible audio and video signals from those channels generally unavailable to nonsubscribers, or the operator must broadcast the channels only at times of day when significant numbers of children are unlikely to be viewing. Appellants have taken these appeals from the district court's refusal to grant them a preliminary injunction against implementation or enforcement of the statute.

1. Approximately 62 million households nationwide receive cable television. J.S. App. 12a. Cable subscribers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to "premium" channels that provide sports programming, recently released movies, or sexually explicit adult entertainment. *Id.* at 7a. Cable subscribers may also order premium programming on a pay-per-view basis, permitting the subscriber access to a particular movie or sporting event for a specified additional fee. *Ibid.*

To ensure that subscribers who have not paid for premium programming are not able to view it, most cable operators "scramble" the programming at their central transmission facility (the "headend"), using either "RF" or "baseband" technology. Such scrambling may render the video portion of the picture completely unintelligible to those who do not subscribe to the premium programming, or it may merely make the picture jump and roll, while leaving images on the screen discernible. The cable operator provides subscribers who are authorized to receive the premium channel a set-top device, called a converter (or converter/descrambler), which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of the channel. RF scrambling does not affect the audio portion of the signal. As a result, the audio portion can be heard on all subscribers' television sets at all times. J.S. App. 8a-9a & nn. 11-12. Modern baseband scrambling may make the audio signal unintelligible, but prior generations of baseband scrambling may leave it unimpaired. Kramer Decl., ¶¶ 15, 23-25, 43-44; Jackson Decl., ¶¶ 21-22.

The limitations of these scrambling systems give rise to what is known as "video and audio bleed" or simply

"signal bleed." In any system where premium programming is carried, all subscribers receive the scrambled signal of each premium channel. As a result, insofar as the video or audio signal of a premium channel is not completely scrambled, those who do not subscribe to the channel will be able to receive some or all of the video or audio signal. That is true not only for subscribers who have cable-ready televisions that can be directly connected to the subscriber line, but also for subscribers whose televisions are connected by set-top converters (other than sets connected to "mapping" converters that completely block both audio and video signals from channels to which the homeowner does not subscribe). J.S. App. 10a-11a. Signal bleed is a particular problem with sexually explicit adult programming, because it allows some or all of the video and audio to be seen and heard on the televisions of tens of millions of cable subscribers who do not subscribe to such programming and is, therefore, available to their children. *Id.* at 11a-12a.

2. When Congress enacted Section 505, it was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). As Senator Feinstein, one of the sponsors of Section 505, commented, "[p]arents * * * come home after work only to find their children * * * watching or listening to the adult's-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

Congress's concerns were triggered by complaints from across the country. For example, Mr. Anthony Snesko had made 550 copies of a videotape showing the Spice Channel—one of the channels operated by appellant in No., 96-1108—as it appeared on his television at 9:00 a.m. in the morning sometime in April or May, 1994, and had distributed a copy to every member of the House and Senate. Snesko Decl., ¶ 12.[2] In December 1995, a mother from Cape Coral, Florida, complained to her congressman that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4:00 in the afternoon, "transfixed" by scenes of "a naked man sodomizing a woman" together with the "groans and epithets that go along." DX 14.[3] In 1993, Senator Biden urged the Federal Communications Commission to review a cable company's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 31. See also, *e.g.*, DX's 17, 19, 29 (constituent letters

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[2] The videotape shows a scene in which a man performs oral sex on a woman. The video images, while partially scrambled, are discernible. The audio contains four-letter words and vulgar references to sexual organs. DX 1.

[3] The district court received other evidence of partially scrambled transmissions by Playboy and Spice. For example, Defendants' Exhibit 4 contains partially scrambled scenes videotaped from the Playboy Channel in Orange, California. Harris Decl., ¶ 5. The scenes depict "images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other." J.S. App. 12a. Defendants' Exhibit 5 is an audio tape of the Spice Channel in early 1994 in the Oxnard, California home of a non-Spice subscriber. Allen Decl., ¶ 5. The tape contains "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans." J.S. App. 12a.

complaining about inadequately scrambled "sex channels" and their availability to children).[4]

In her floor statement, Senator Feinstein acknowledged that Congress could require cable operators to provide complete blocking of audio and video signals on request of a subscriber—an approach Congress ultimately adopted and included in Section 504 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 136. But Senator Feinstein observed that that proposal did not "go[] far enough," insofar as it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." 141 Cong. Rec. S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein). She explained that Section 505, by mandating scrambling of both the audio and video portions of indecent programming on adult-oriented networks, would not require cable operators to do anything other than what the industry was already capable of and, in fact, was already doing in some communities. *Ibid.*

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. As enacted, Section 505 provides that, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedi-

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[4] The record in this case reflects the ease with which children have access to less than fully scrambled adult programming. Mr. Snesko's nephew, for example, knew how to disconnect a television set from the converter box in order to watch Spice, even though the boy's father did not even know that Spice could be received in the house. Snesko Decl., ¶ 3. In Rock Island, Illinois, junior high school children discovered that they could watch the Spice Channel after school long before the adult community became aware that Spice was not fully scrambled. Mahlo Decl., ¶¶ 4-6.

cated to sexually-oriented programming," an MSO "shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." Until the MSO complies with those requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." 110 Stat. 136.

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 5386 (1996) (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of that programming on a network primarily dedicated to sexually-oriented programming which is itself indecent. See *Implementation of Section 505*, ¶ 6.

The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or [other multichannel video programming distribution] medium," and proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 9, 16. As the Commission explained, that is essentially the same definition adopted by the Commission, and repeatedly sustained by

the courts, for purposes of regulating indecent broadcast programs and telephone messages.

The Commission finally proposed, and provisionally adopted, a safe harbor for purposes of Section 505's time-channeling requirement of 10:00 p.m. to 6:00 a.m., the same safe harbor hours previously established for airing indecent broadcast television or radio programs. *Implmentation of Section 505*, ¶¶ 5, 8; see also 47 C.F.R. 73.3999.

4. Appellants provide "virtually 100% sexually explicit adult programming" (J.S. App. 8a) for transmission by cable operators to premium subscribers. Appellant Playboy provides such programming via its Playboy Television and AdulTVision networks, while appellant Spice Entertainment[5] provides the programming on its Adam & Eve and Spice networks.

On February 26, 1996, Playboy filed suit in district court seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violated appellant's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment, and on March 7 granted a temporary restraining order preventing Section 505 from going into effect on March 9. J.S. App. 4a-5a & n.7; see *Playboy Entertainment Group, Inc.* v. *United States*, 918 F. Supp. 813 (D. Del. 1996). A three-judge district court was then appointed under Section 561(a) of the Act. J.S. App. 3a-4a & n.6. Following discovery and briefing, the three-judge district court held a hearing on appellants' motion for a preliminary injunc-

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[5] The district court refers to appellant Spice Entertainment Companies by its former name, Graff Pay-Per-View, Inc.

tion. The court permitted supplemental briefing after this Court's decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374 (1996). J.S. App. 5a.

5. On November 8, 1996, the court issued a decision denying appellants' motion for a preliminary injunction against implementation and enforcement of Section 505. The court recognized that issuing a preliminary injunction against "a law drafted and adopted by a co-equal branch of government" invokes "one of the judiciary's most 'awesome responsibilit[ies] calling for the utmost circumspection in its exercise.'" J.S. App. 20a (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers)). The court concluded that "at this preliminary injunction stage, * * * [appellants] ha[d] not met the requirements for the issuing of a preliminary injunction." J.S. App. 20a. In particular, the court noted that appellants had failed to show "that they are likely to prevail on the merits if [their] claims are ultimately litigated" and failed to "demonstrate that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images." *Id.* at 22a.

a. The court held, under *Denver Area*, that appellants' First Amendment claim had to be reviewed under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech. J.S. App. 25a. Even though Section 505 is "aimed at the content-neutral objective of preventing signal bleed," the court analyzed it as a content-based restriction because it applies "only when signal bleed occurs during the transmission of 'sexually explicit adult programming or other programming that is indecent.'" J.S. App. 27a.

The court found that Section 505 addresses a compelling interest in "protect[ing] children from sexually explicit material, particularly in the context of a pervasive medium" such as cable television. J.S. App. 27a. The court noted that in *Denver Area*, a plurality of this Court had found that cable television, like the radio broadcast system in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), is "uniquely pervasive" and that it is "as 'accessible to children' as over-the-air broadcasting if not more so." J.S. App. 30a (quoting *Denver Area*, 116 S. Ct. at 2386). Because of imperfect signal scrambling, millions of children "have potential access not only to indecent sounds, * * * but also to sexually explicit visual images," even in those households that "do not subscribe to sex-dedicated networks." J.S. App. 31a.

The court also held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire." J.S. App. 34a. Instead, Section 505 gives cable operators two alternative means of compliance—complete scrambling of audio and video or time-channeling. Although the court recognized that there would be a "substantial expense" involved in completely scrambling the audio and video, it noted that "§ 505 does *not* require that [cable operators] shoulder potentially fatal economic burdens." *Id.* at 32a-33a. Moreover, the court held that the economic burden imposed by the complete scrambling requirement is mitigated "in light of the substantially less expensive option provided by time-channeling," *id.* at 33a, which the Supreme Court in *Pacifica* had held to be constitutional in analogous circumstances. *Ibid.*

The court also rejected the claim that Section 504 is a less restrictive alternative that would accomplish the same end. Section 504 requires cable operators, on subscriber request, to scramble fully or otherwise fully block audio and video transmission of *any* channel, without charge. But under Section 504, the subscriber must learn of the problems caused by signal bleed and of the availability of complete scrambling on request, and the subscriber must then take the initiative in making the request of the cable operator. J.S. App. 35a. The court found that the evidence, at this stage of the case, did not show that Section 504 was "a viable alternative." *Ibid.* The court noted that "many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children." *Id.* at 35a n.28. The court also explained that, even insofar as parents are aware of the problem, "there is no evidence that parents are * * * aware of the § 504 means of achieving complete blocking of undesired channels." *Id.* at 35a. The court added that "children watch television in the homes of their friends as well as in their own homes," and that Congress reasonably wished "to extend protection from signal bleed beyond a child's own home." *Ibid.*

b. The court also held that plaintiffs are unlikely to succeed on the merits with respect to their equal protection claim. The court noted that Section 505 treats sex-dedicated networks differently from other premium networks, which occasionally showed sexually explicit scenes in their programming. The court noted, however, that sex-dedicated networks such as those operated by appellants transmit sexually explicit adult programming 24 hours a day. By contrast, the court referred to evidence that sexually explicit programming constitutes "only a fraction of the programming"—in one cited instance, substantially less than one-sixteenth—on ordinary

premium channels. J.S. App. 37a. The court explained that Congress's distinction is justified because "signal bleed from that one-sixteenth * * * would not continuously present sexually explicit scenes to the channel surfer." *Ibid.*

c. Finally, the court held that Section 505 is not unconstitutionally vague. The use of accepted terms such as "indecent" give the statute sufficiently clear meaning. J.S. App. 39a-40a.

6. Appellants filed notices of appeal (96-1034 J.S. App. 42a; 96-1108 J.S. App. 1a), and moved for an injunction pending appeal. On November 15, 1996, the district court stayed enforcement of Section 505 pending disposition of appellants' motions. On December 5, 1996, the district court granted a stay of enforcement pending appeal. Section 505 of the Act has thus not yet been permitted to go into effect.

ARGUMENT

The district court refused to preliminarily enjoin the implementation and enforcement of an Act of Congress, holding that appellants had failed to satisfy the prerequisites for such relief at this stage of the litigation. That decision, which is subject only to narrow appellate review for abuse of discretion, should be summarily affirmed. In light of the weighty presumption of constitutionality that accompanies an Act of Congress, a district court's refusal to enjoin a statute's implementation at an early stage of litigation and before the parties have had opportunity for a full factual and legal presentation could constitute error only in the most exceptional circumstances. Indeed, the district court's opinion in this case specifically refers to issues that remain to be resolved in further proceedings, thus rendering the case particularly unsuitable for plenary review at this time. Moreover, the district

court's determination that appellants are unlikely to succeed on the merits follows settled First Amendment doctrine, set forth in decisions of this Court up to and including this Court's recent decision in *Denver Area*. Accordingly, this is plainly not the rare case in which an Act of Congress is so patently unconstitutional that a district court could be viewed as having abused its discretion by refusing to enjoin its implementation during the pendency of litigation.

1. This Court has frequently reaffirmed the "well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama* v. *United States*, 279 U.S. 229, 230-231 (1929). Accord *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 535 (1960) ("The balancing of * * * competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion."); *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944) ("award of an interlocutory injunction * * * has never been regarded as strictly a matter of right"); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944); *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940); *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 50-51 (1923); *Synanon Found., Inc.* v. *California*, 444 U.S. 1307 (1979) (Rehnquist, J., in chambers).

In this case, the district court exercised its discretion to refuse to grant a preliminary injunction against implementation and enforcement of an Act of Congress. Such a decision would constitute an abuse of discretion only in the most exceptional circumstances. "[J]udicial power to stay an act of Congress, like judicial power to

hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). Acts of Congress are presumptively constitutional, *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985), and should not be invalidated except "for the most compelling constitutional reasons." *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989) (internal quotations omitted). Absent such a showing, the challenged statute "should remain in effect pending a final decision on the merits by [the courts]." *Turner Broadcasting Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). Accord *Bowen* v. *Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers).

Those principles apply no less in First Amendment cases than in others. Where the constitutionality of an Act of Congress is not at issue, the possibility of an injury to a party's First Amendment rights may justify issuance of a preliminary injunction under some circumstances. But when a party seeks to enjoin implementation and enforcement of an Act of Congress, the balance of equities shifts significantly against invalidating the Act on a preliminary basis—and based on an incomplete record—during the pendency of litigation.

For example, *Turner Broadcasting* involved a First Amendment challenge to provisions of the 1992 Cable Act, which require cable operators to set aside a portion of their channel capacity for carriage of local broadcast stations. Plaintiffs sought, and were denied, an injunction against enforcement of these "must carry" provisions pending this Court's review. 507 U.S. at 1302. Indeed, the must-carry requirements remain in effect even though this Court vacated the lower court's judgment

upholding their constitutionality, remanded the case for further proceedings, see *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994), and has accepted the case again for additional review. *Turner Broadcasting Sys., Inc.* v. *FCC*, No. 95-992 (argued Oct. 7, 1996).[6]

The district court's determination not to invalidate Section 505 during the pendency of litigation was particularly appropriate in light of the state of the record in this case. For example, one of appellants' key arguments is that the availability of consumer-initiated channel-by-channel blocking under Section 504 is sufficient to render Section 505 a more restrictive—and hence, in their view, unconstitutional—alternative. See 96-1034 J.S. 19-20, 20-21; 96-1108 J.S. 20-22. Substantial evidence was introduced, however, that Section 504 is not a viable alternative to Section 505.[7] The district court noted that appellants failed to produce contrary evidence that "MSOs are

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[6] See also *Daniels Cablevision, Inc.* v. *FCC*, 835 F. Supp. 1, 10-12 (D.D.C. 1993), aff'd in part *sub nom.*, *Time Warner Entertainment Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996) (holding three provisions of the 1992 Cable Act unconstitutional, but nevertheless declining to enjoin their enforcement pending appeal).

[7] For example, complete blocking on request through the use of "lockboxes" has been available by law since at least 1984, when Congress enacted 47 U.S.C. 544(d)(2). The primary relevant difference between that provision and Section 504 is that under prior law the cable operator could charge customers for the lockbox. Yet the record in this case demonstrates that, notwithstanding the availability of lockboxes and the fact that there is no evidence that anyone affirmatively desires signal bleed, see J.S. App. 13a, appellants' networks are "bleeding" into millions of cable households that do not subscribe to their programming. That constitutes significant evidence that complete blocking on request is ineffective to protect children from signal bleed. *Cf. Denver Area*, 116 S. Ct. at 2393. In addition, signal bleed poses further problems because children view television not only in their own homes, but also in the homes of their friends. J.S. App. 11a-12a.

advising cable customers of the availability" of the Section 504 process or that "customers are responding to such notices, if given." J.S. App. 17a.[8] But the court also noted that "[a]t the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us." *Ibid.* See also *id.* at 13a n.13 (noting need for "more specific evidence of the number of households with the potential for signal bleed" before decision on permanent injunction); *id.* at 19a n.19 (expressing "skepti[cism]" regarding appellants' "estimate of revenue loss"); *id.* at 29a n.25 (noting need for "additional evidence demonstrating the effects of sexually explicit materials on children" before decision on permanent injunction). With potential factual uncertainties of that sort still remaining, the district court properly declined to enjoin Section 505.

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[8] Appellants err in arguing (96-1034 J.S. 20-21; 96-1108 J.S. 21-22) that the district court incorrectly shifted the burden of proof on whether Section 504 would be a less restrictive alternative. Initially, appellants' argument appears to rest on the incorrect premise that in a preliminary injunction proceeding where parties seek to enjoin an Act of Congress, the government must conclusively prove its case in favor of constitutionality in full before the court may reject the request for an injunction. See, *e.g.*, 96-1108 J.S. 22 n 19. In any event, the government in this case introduced substantial evidence, accepted by the district court, that the "lockbox" alternative provided by the 1992 Cable Act and its close cousin, the Section 504 complete-blocking-on-request option, had not been effective to resolve the problem and are therefore unlikely to be effective in the future. See note 7, *supra*. When the district court stated that there was not enough evidence to let the court "effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed," J.S. 20 (quoting J.S. App. 17a), it was simply pointing out that appellants had failed to rebut the government's case and were, on the present record, therefore not likely to succeed on the merits.

2. The district court's determination that appellants are unlikely to succeed on the merits represents a straightforward application of settled precedent from this Court, recently reaffirmed in *Denver Area*.

a. Section 505 is constitutional for the same reasons that this Court found Section 10(a) of the statute before the Court in *Denver Area* constitutional. Section 10(a) authorizes cable operators to ban indecent programming that would otherwise be broadcast on leased access channels. The justification for Section 505 is the same interest that the plurality in *Denver Area* found justifies Section 10(a): "[t]he need to protect children from exposure to patently offensive sex-related material," which "this Court has often found compelling." 116 S. Ct. at 2386.

Moreover, as in *Denver Area*, the problem addressed by Section 10(a)—the need to protect children from indecent material on television—is "remarkably similar" to the problem that this Court had previously addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and Congress's solution is also "commensurate with the balance [the Court] approved [in *Pacifica*]." 116 S. Ct. at 2386. In *Pacifica*, the Court upheld a requirement that radio broadcasters limit indecent language to times of the day when children are unlikely to be in the audience. A broadcaster may comply with Section 505 by similarly limiting indecent visual or audio material on appellants' networks to the same times of day. See also *Denver Area*, 116 S. Ct. at 2387 (noting that the fact that Section 10(a) grants operators "flexibility" to "rearrange broadcast time" to "lessen[] the risks of harm to children" supports its constitutionality). Indeed, Section 505 is substantially less restrictive than the requirement at issue in *Pacifica*. While the broadcaster in *Pacifica* was offered *only* the option of time channeling the indecent programming,

Section 505 also offers the option of complete blocking to eliminate signal bleed.

The plurality in *Denver Area* also referred to "the permissive nature of § 10(a)" as supporting its constitutionality. 116 S. Ct. at 2387. The plurality explained that "although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban." *Ibid.* The plurality recognized that under Section 10(a) the cable operator could choose to "ban" the indecent programming altogether, "in light of comparative audience demand and a host of other practical factors." *Ibid.* Yet despite that "uncertainty as to practical consequences," *ibid.*, the Court held Section 10(a) to be constitutional.

In this case, the requirements imposed by Section 505 also do not amount to an outright "governmental ban." As noted above, cable operators may comply with Section 505 by time channeling appellants' programming to the FCC's "safe harbor"—the same safe harbor found constitutionally acceptable in *Pacifica*. As the district court held (J.S. App. 33a-34a), the availability of that option is sufficient to justify Section 505.

In addition, the district court's findings reflect that completely blocking the audio and video signal to preclude signal bleed is also a viable option. The district court relied on the evidence of an officer of appellant Spice, who "testified that roughly half of the systems carrying [Spice] programming are in compliance with § 505." J.S. App. 15a. Those systems either use modern baseband technology that fully scrambles both video and audio signals, see *id.* at 9a n.12, or they "have already adopted 'double scrambling'" to eliminate "audio and/or video bleeding," *id.* at 19a. Moreover, many households have "convertor boxes [that] will map out [appellants'] channels and as a consequence these households will not

receive 'signal bleed.'" *id.* at 12a. Finally, digital cable television, a technology now being adopted by cable systems, "will prevent all audio and video bleeding." *Id.* at 15a.

Thus, some cable systems already have eliminated the problem of signal bleed without time channeling. In light of the large number of households that are already effectively in compliance and the trend toward digital television, other cable operators are likely to be able to do so as well. Accordingly, by offering the option of eliminating signal bleed while continuing 24-hour-a-day programming, Section 505 protects children from indecent materials in a way that is less restrictive than that which this Court found constitutional in *Denver Area* and *Pacifica*.

b. Section 505 does not suffer from the defects that led this Court in *Denver Area* to find two other statutory provisions unconstitutional. The Court in *Denver Area* held that Section 10(b)—the provision requiring cable operators to segregate indecent leased access programming on separate channels available to subscribers only on request—had a number of features that, cumulatively, rendered the statute unconstitutional. None of them are applicable to Section 505.

Section 10(b) permitted a delay of up to 30 days before a cable operator had to respond to a subscriber's request for access to (or reblocking of) an "indecent" channel. It also required viewers to request access to the segregated, "indecent" channel in writing, thus deterring viewers concerned about maintaining their privacy. By contrast, the Court specifically cited Section 505, among other provisions, as "significantly less restrictive than [Section 10(b)]." 116 S. Ct. at 2392.[9] It does not "force the viewer

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[9] A majority of the Court joined in the portion of the opinion addressing Section 10(b).

to receive (for days or weeks at a time) all 'patently offensive' programming or none." *Ibid.* Nor does it "automatically place the occasional viewer's name on a special list," *ibid.*; as the district court noted, "with sexually explicit premium and pay-per-view programming, the subscriber will * * * be identifiable through billing for the programming," regardless of whether Section 505 is implemented. J.S. App. 19a. In short, although Section 10(b) in *Denver Area* was not "a narrowly, or reasonably, tailored effort to protect children," 116 S. Ct. at 2394, Section 505 "strikes a permissible balance of constitutional interests." J.S. App. 34a.[10]

The Court in *Denver Area* also held Section 10(c) of the 1992 Act unconstitutional. That provision applied to public, educational, and governmental (PEG) access channels, as opposed to the commercial leased access channels to which Sections 10(a) and 10(b) applied. Section 10(c) provided that cable operators could refuse to

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[10] Appellant Spice Entertainment's claim (96-1108 J.S. 2) that Section 505 "interferes even more substantially" with speech than Section 10(b) is wrong. Aside from the distinctions cited in text, Section 10(b) attempted to regulate quite directly the communications between the programmer and its intended audience; the statute provided that such communications could take place only on segregated channels to which indecent programming would be confined and that had been specifically requested, in writing, by each viewer. Although a casual viewer may desire the programming and the programmer may want to reach that viewer, Section 10(b) would have precluded the communication from occurring absent the segregation on a separate channel and the viewer's written request. Section 505, by contrast, is not aimed at the communication between the programmer and the intended viewer, and it imposes no mandatory requirements on such communication. Instead, it provides that steps must be taken to avoid communication between the programmer and individuals whom the programmer is trying *not* to reach and who have no interest in receiving the programming (because they have not subscribed to it).

show indecent material on PEG channels. As the plurality explained, Section 10(c) was unconstitutional primarily because there was no showing that there was a legitimate need for giving cable operators that kind of veto power over PEG programming. The plurality noted that, under the pre-1992 Act regime, each community already had "a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community." 116 S. Ct. at 2395.[11] By contrast, the district court in this case found that "[t]here is no question that * * * millions of children * * * have potential access not only to indecent sounds, * * * but also to sexually explicit visual images." J.S. App. 31a. And, as the district court stated, "[u]pon this record, the government has demonstrated that § 504 will not be a viable alternative" to address that problem. *Id.* at 35a. See also *id.* at 17a (granting appellants the opportunity, "[a]t the time of the permanent injunction hearing," to present "further evidence of the actual and predicted impact and efficacy of § 504"). Accordingly, Section 505 does not suffer from the defect that rendered Section 10(c) unconstitutional in *Denver Area*.

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[11] See also 116 S. Ct. at 2395-2396 ("the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming"); *id.* at 2396 (finding no "significant nationwide pattern" of indecent programming accessible to children on PEG channels); *id.* at 2397 ("In the absence of a factual basis substantiating the harm and the efficacy of [Section 10(c)], we cannot assume that the harm exists or that the regulation redresses it."); *ibid.* ("given present supervisory mechanisms, the need for [Section 10(c)], aimed directly at public access channels, is not obvious").

3. Appellants argue (96-1034 J.S. 13; 96-1108 J.S. 14-15) that eliminating signal bleed from appellants' programming under Section 505 would require cable operators to incur significant additional costs; that the operators will choose to avoid those costs by adopting the time channeling alternative instead; and that that is sufficient to demonstrate that Section 505 is unconstitutional.

The district court did find that there is "a substantial expense involved in complying with [Section 505]." J.S. App. 32a. As the court recognized, however, "economics alone cannot dictate the result where constitutional rights are at issue." *Ibid.* The extra costs involved are the result of the "indirect effects" of signal bleed on individuals who are not part of their audience, who do not want their programming, and with whom they have no interest in communicating. See *id.* at 2a-3a ("[appellants] do not contend that signal bleed itself is protected speech"); *id.* at 13a ("No evidence was presented of any consumer desire to receive 'signal bleed.'"). This Court has consistently held that a speaker may be forced to bear such indirect costs of its programming. See, *e.g.*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986); *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring). And in *Denver Area*, the Court pointedly noted that an acceptable mode of dealing with the problem of children's access to patently offensive sexually explicit programming is to "impos[e] cost burdens upon system operators (who may spread them through subscription fees)." 116 S. Ct. at 2393. In Section 505, that is exactly what Congress did (although it mitigated the burden of those costs by adding the additional option of time channeling).

Even if the precise costs of compliance with Section 505 were of significance, that amount is open to substan-

tial doubt on this record. The district court found reasons to be "skeptical of [appellants'] estimate of revenue loss," J.S. App. 19a n.19, indicating that it would be inappropriate to base a preliminary injunction on inflated and unproven claims of dire economic consequences.[12] Moreover, for the reasons given above, see pp. 18-19, compliance with Section 505's complete blocking requirement is a viable option. And Section 505 also contains the time-channeling safe harbor, a restriction upheld in *Pacifica* in a context in which it was the *only* option available. In permitting an additional option which is technology feasible here, the government is not required to subsidize that option. Here, the district court correctly concluded that "§ 505 does *not* require that MSOs shoulder potentially fatal economic burdens." J.S. App. 32a-33a.[13]

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[12] Appellant Playboy asserts that the district court "found as a factual matter that Section 505(a) would 'undoubtedly' impose 'substantial expense' upon cable operators and 'potentially fatal economic burdens,' including the 'possibility of bankruptcy' of the targeted networks." 96-1034 J.S. 13. That assertion is inaccurate. The district court did state that there is "undoubtedly a substantial expense involved in complying with subsection (a) [full scrambling]," J.S. App. 32a, but the other two quoted phrases are the court's statement of *appellants'* position. Thus, the court stated: "Not only do [appellants] foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505." *Ibid.* (emphasis added). The court itself, by contrast, expressed skepticism about appellants' estimates of economic injury, *id.* at 19a, and found that such injury would *not* be "potentially fatal." *Id.* at 33a.

[13] Even if the time channeling safe harbor is used, Section 505 leaves open ample means for adults to view indecent programming when it is broadcast or they "may * * * use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.6. Although appellant Spice argues that time-shifting through use of a VCR is not an adequate alternative, 97-1108 J.S. 8-9, the district court noted that Spice's Vice President testified "that a 10:00 p.m. starting

4. Appellants argue (96-1034 J.S. 22-25; 96-1108 J.S. 24-29) that Section 505 violates their right to equal protection of the laws. Appellants assert that Congress could not legitimately distinguish between continuous indecent programming, such as that on appellants' networks, and the occasional sexually explicit programming on other premium cable networks. That argument is mistaken.

In *Denver Area*, the Court "recognize[d] * * * that Congress need not deal with every problem at once." 116 S. Ct. at 2393. See also *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (Court does "not require that the Government make progress on every front before it can make progress on any front"). The district court in this case determined that sex-dedicated networks such as those run by appellants pose a unique threat that justifies distinct legal treatment. For example, the court referred to evidence showing that "the number of sexually explicit programs available on non-adult channels * * * was one sixteenth that shown on the [appellants'] adult channels." J.S. App. 8a. Further, the court noted, even that figure substantially overstates the indecent programming on the non-adult channels. The non-adult channels show "mainly 'R' rated movies which contained some sexually explicit scenes but were not continuously sexually explicit." *Ibid.* By contrast, appellants' programming is "continuously sexually explicit," *ibid.*; they provide "nothing but

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time would cause no loss of revenue" because "people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours." J.S. App. 20a n.19. Section 505 also leaves adults entirely free to obtain indecent programming by "purchas[ing] tapes and records or go[ing] to theaters and nightclubs" where indecent programming is available. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 & n.28 (1978).

sexually explicit programming intended for adult audiences," *id.* at 37a-38a.

In light of those findings, Congress's determination to address the problems caused by appellants' networks is unassailable. A child innocently flipping the channels of a cable television would be very *un*likely to view or hear sexually explicit signal bleed from ordinary, non-adult premium channels. The same child, however, could not help but view or hear sexually explicit materials—such as "scrambled images of * * * two nude women in the water and in a boat, caressing each other" or "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans," J.S. App. 12a—if the child advertently or inadvertently turned to signal bleed from appellants' networks. As the district court explained, "[t]he cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks." *Id.* at 38a.

5. Appellant Playboy claims (96-1034 J.S. 25-29) that Section 505 is unconstitutionally vague. See also 96-1108 J.S. 29 n.30. Section 505 applies to "sexually explicit adult programming or other programming that is indecent on any channel * * * primarily dedicated to sexually-oriented programming." This Court has repeatedly upheld similar definitions against vagueness challenges.[14] The district court's determination, at this stage of the litigation, that appellant Playboy is unlikely to succeed on its vagueness challenge was accordingly correct.

The FCC has interpreted the key terms in Section 505. It interpreted the term "sexually explicit adult programming" to be a category of "programming that is

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[14] Lower federal courts have also rejected vagueness challenges in similar circumstances. See 96-1034 J.S. 26 n.30 (citing cases).

indecent," a term that follows it in the statute. *Implementation of Section 505*, ¶¶ 6, 9. The Commission also construed Section 505 to require scrambling or time-channeling only of programming that is itself indecent and that is broadcast on a network primarily dedicated to sexually-oriented programming. See *Implementation of Section 505*, ¶ 6. The Commission defined "'indecent' programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable * * * medium," and it proposed to adopt that definition on a permanent basis. *Implementation of Section 505*, ¶¶ 6, 9.

The FCC has thus defined the key statutory terms in terms of "indecent programming," and it has defined "indecent programming" in terms of "patently offensive" depictions of "sexual or excretory activities or organs." That definition is similar to the second element in the definition of obscenity in *Miller* v. *California*, 413 U.S. 15, 24 (1973) ("depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"). The Court in *Miller* upheld that formulation against a vagueness challenge. *Id.* at 27 & n.10. See also *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57-58 & n.6 (1989) (rejecting vagueness challenge to statute that defined obscene conduct as conduct that, *inter alia*, "depicts or describes, in a patently offensive way, sexual conduct"). The definition is also similar to the statute at issue in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which criminalized sale to minors of obscene pictures that were, *inter alia*, "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." *Id.* at 633.

The Court in *Ginsberg* rejected a vagueness challenge to that statute. *Id.* at 643-645.

In *Denver Area*, a four-Justice plurality of the Court expressly rejected a vagueness challenge to a provision giving cable operators a right to prohibit programming on leased channels "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three additional Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. *Id.* at 2419 (opinion of Thomas, J., concurring in part and dissenting in part).

Appellant Playboy concedes that its network is covered by Section 505, but it argues that the statute is vague because "it is unknown what *other* networks might be affected." 96-1034 J.S. 27 (emphasis added).[15] That argument fails, however, because a party to whom an allegedly vague statute applies has no standing to complain of its vagueness with regard to others. *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute

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[15] Appellant Playboy (96-1034 J.S. 28) refers to Section 506 of the 1996 Act, which appellant states "added 'nudity' to the list of proscribable 'indecent' programming on public and leased access channels." Section 506, however, amends the statute upheld in *Denver Area* and applies *only* to public and leased access channels. It does *not* apply to channels covered by Section 505, *i.e.*, "any channel * * * primarily dedicated to sexually-oriented programming." Accordingly, the term "nudity" in Section 506 has no application to appellants' programming and it has no bearing on the constitutionality of Section 505. See also Order and Notice of Proposed Rulemaking, *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85, ¶ 111 (1996) ("tentatively conclud[ing] that the term 'nudity' as used in Section 506(a) and (b) of the 1996 Act should be interpreted to mean nudity that is obscene or indecent").

clearly applies may not successfully challenge it for vagueness."); see *American Mini Theatres*, 427 U.S. at 58-59.

The Constitution requires the government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Perfect clarity, however, is neither possible nor constitutionally required, *id.* at 110, particularly in a statute like Section 505 that imposes a civil regulatory requirement on commercial entities, rather than a criminal prohibition. See, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8, 361 (1983); *Winters* v. *New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."). [16] In light of their history and authoritative interpretation by the FCC, the terms "patently offensive" and "sexual or excretory activities or organs" give fair warning concerning what types of depictions and communications are and are not prohibited by Section 505. If the legislature is to be permitted to protect children by regulating the broadcast of patently offensive communications, no greater precision can be expected or required.

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[16] Under 47 U.S.C. 501, anyone "who willfully and knowingly does * * * any act" that is "prohibited or declared to be unlawful" by the Communications Act of 1934, which includes Section 505, is subject to criminal prosecution. The various provisions of the Communications Act relating to indecency, however, have always been enforced through use of the FCC's civil remedial authority, not through the criminal law. Section 505 is therefore appropriately treated as a civil statute in analyzing the vagueness issue, particularly in the context of this pre-enforcement facial challenge to its validity.

CONCLUSION

The order of the district court denying a preliminary injunction should be affirmed.

Respectfully submitted.

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No. 96-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Delaware

Brief Opposing Motion to Affirm

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Brief Opposing Motion To Affirm

1. Contrary to the government's assertion, this case is appropriate for resolution now by this Court. The essential elements of Playboy Entertainment Group's ("Playboy's") claim challenging Section 505 of the Telecommunications Act of 1996 are not in dispute and were acknowledged by the lower court. Section 505 will cut off protected speech for two-thirds of the broadcast day for all households in the cable systems affected, including the two-thirds of homes in which no children reside. While Section 505 purports to provide cable operators with a choice of time channeling between 10:00 p.m. and 6:00 a.m. or totally scrambling both the audio and video signal, the "substantial expense" to employ scrambling technology makes time channeling the only viable option as even the government's expert witness agreed. Tr. at 459 (Test. of J. Kramer). As the lower court noted, all major cable operators have announced that they will adopt time channeling if Section 505 becomes effective. J.S. App. 20(a).

Given the substantial burden of Section 505 on protected speech, the lower court erred in not recognizing the existence of a lesser restrictive means to allow parents to protect children from any partially scrambled signals of adult networks. Section 504 provides parents the means to fully scramble any cable channel, J.S. App. 16a, including adult oriented networks, by requiring cable operators to block at their expense any channel upon request. Further discovery or hearings will not alter these fundamental facts.

This is not, as Appellees frame the issue, a request for this Court to enjoin a federal law while this Court considers whether or not to accept the case for full review.[1] After

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[1] For that reason, Appellees' reliance on *Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 1304 (1993), in which the Chief Justice denied injunctive relief pending appeal, is misplaced. Playboy now stands in the same position as appellants in *Turner*, who sought and obtained plenary review by this Court. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 636 (1994)("Cable programmers and cable operators engage in and

considering post-hearing briefs, the court below decided to enjoin enforcement of Section 505 by its own order pending review by this Court, just as the District of Columbia Circuit enjoined enforcement of Section 10 of the 1992 Cable Act in *Alliance for Community Media* v. *FCC*, 56 F.3d 105 (D.C. Cir. 1995), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374 (1996). Contrary to the government's claim about the "exceptional" nature of injunctive relief barring enforcement of an act of Congress in these circumstances, such relief was granted in *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989). That case, which is directly on point, is not mentioned by Appellees.

There are no "issues that remain to be resolved in further proceedings," Mot. to Aff. at 12, that are of constitutional significance, or that preclude plenary review now. None of the "potential factual uncertainties" the government identifies justifies delay. Given that the experts agree that most cable systems lack the technology to scramble their audio signal, there is no real dispute regarding "the number of households with the potential for signal bleed." Moreover, the government has always disavowed any need to prove "the effects of sexually explicit materials on children." Mot. to Aff. at 16. Nor is there any disagreement that Section 505 will cut off access by willing viewers to Appellant's networks. The government merely questions the precise amount of the revenue loss associated with this restriction on protected speech—a matter that is not a prerequisite to constitutional review. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 211-212 n.8 (1975). Appellees suggest further proceedings are necessary so that Appellant can demonstrate the effectiveness of less restrictive measures, such as Section 504. But this Court has repeatedly—and emphatically—denied the need for such proof. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2391-2394 (1996); *Sable Communications*, 492 U.S. at 129.

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transmit speech, and they are entitled to the speech and press provisions of the First Amendment."). Other cases Appellees cite are distinguishable for the same reason.

2. Section 505 imposes an unconstitutionally heavy burden on protected speech. As everyone agrees, such burdens are subject to "strict scrutiny or something very close to strict scrutiny." J.S. App. 25a; *see* Mot. to Aff. at 15. It is bedrock law that the First Amendment permits laws that restrict unwanted speech "by an affirmative act of the [listener]," *Rowan* v. *United States Post Office Dep't.*, 397 U.S. 728, 737 (1970), but prohibits laws by which "the Government itself can shut off the flow of [speech] to protect those who might potentially be offended," *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 72-73 (1983). The government may not seek a "marginal degree of [added] protection * * * by purging all mailboxes of unsolicited material." *Id.*; *see also Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). As Justice O'Connor wrote in *Turner Broadcasting System*, "[i]f the government wants to protect householders from unwanted solicitors, it may enforce 'No Soliciting' signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say." 512 U.S. at 683 (concurring in part and dissenting in part). *See Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

a. The government argues erroneously that this Court's decisions in *Denver* and in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), support Section 505(b)'s sixteen hour per day ban of Appellant's networks. But this conclusion stems from a misreading of relevant precedent and a mischaracterization of the nature of Section 505.

Appellees ignore the distinction between the exercise of private editorial discretion and the imposition of a government mandate by asserting that Section 505 is constitutional "for the same reasons" as Section 10(a) of the 1992 Cable Act. Mot. to Aff. at 17. That missing distinction was a central feature of *Denver*, 116 S. Ct. at 2387 (plurality op.); *id.* at 2398 (Stevens, J., concurring); *id.* at 2403 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2424 (Thomas, J., concurring in part and dissenting in part), and has been emphasized in other decisions as well, *e.g.*, *Turner Broadcasting Sys.*, 512 U.S. at 683 (O'Connor, J., concurring in part and dissenting in part) ("The question is not whether there will be control over who gets to speak over

cable—the question is who will have this control."). *Cf. Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (private decision to exclude speakers raises no constitutional concern). Indeed, even the Court of Appeals in *Denver* (which had upheld all of Section 10) acknowledged that if "decisions of cable operators not to carry indecent programs" pursuant to Section 10(a) "were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions." *Alliance for Community Media*, 56 F.3d at 113. There is no legitimate comparison here between Section 10(a), which *permits* cable operators to exert control over speech, and Section 505, which *requires* them to do so. The liberties Appellees take in interpreting *Denver* underscore the importance of this Court's review of the instant appeal.

The government does not seriously dispute the fact that turning off entire networks for two-thirds of the broadcast day is a far greater restriction on speech than was authorized in *Pacifica*. J.S. App. 15a-17a. In *Denver*, this Court approved only a voluntary measure that "likely restricts speech *less* than * * * the ban at issue in *Pacifica*,"[2] while striking down mandatory requirements that are "remarkably similar" to Section 505. 116 S. Ct. at 2387 (plurality op.) (emphasis added).[3] Appellees now seek to distinguish

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[2] The government asserts that Section 505 is less restrictive than Section 10(a), upheld by this Court in *Denver*, because a cable operator "could choose to 'ban' the indecent programming altogether" as a practical consequence of Section 10(a). Mot. to Aff. at 18 (quoting *Denver*, 116 S. Ct. at 2387). Perhaps a cable operator could do so (despite the doubts this Court expressed about that possibility in *Denver*), just as a cable operator responding to Section 505 could choose to drop *Playboy Television* altogether. But unlike the permissive solution of Section 10(a), which allows cable operators to accept "indecent" leased access programming, a cable operator could not choose to transmit networks covered by Section 505 outside "safe harbor" hours without subjecting itself to devastating economic consequences.

[3] Throughout this litigation prior to *Denver*, the government repeatedly characterized Section 505 as being "remarkably similar" to Section 10(b). Defs.' Mem. in Opp'n to Pls.' Mots. for

Section 505 from the unconstitutional restrictions of Sections 10(b) and (c). For example, the government claims that Section 505 is "significantly less restrictive" than Section 10(b) because it does not raise the same privacy concerns (as the written request requirement of Section 10(b)), but it ignores the court's finding below that obtaining a trap pursuant to Section 505(a) "interferes with the spontaneous nature" of impulse purchases of adult programming and that the "[p]rofessional installation of traps also raises privacy concerns" that could dissuade subscribers from purchasing the service. J.S. App. 18a-19a. Further, Appellees assert that, unlike Section 10(b), Section 505 does not permit a 30-day delay before the cable operator must respond to a subscriber's initial request for service. Mot. to Aff. at 19. However, this ignores that Section 505(b) imposes a continuing delay for viewing until after 10 p.m. every day that applies to all existing and prospective viewers for all time.[4]

b. Contrary to Appellees' claims, Section 505 does not give cable operators "flexibility." The court below acknowledged that there is "undoubtedly a substantial expense involved in complying with subsection (a)." J.S. App. 32a. Indeed, implementation of digital transmission technology would cost billions of dollars, *see* Playboy Ex. 2,

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Prelim. Inj. at 3, 34; Defs.' Mem. in Opp'n to Pl.'s Appl. for a T.R.O. at 2, 21. Its post-*Denver* understanding, by contrast, is that Section 505 is intended to address a problem that is "remarkably similar" to that covered by Section 10(a). Mot. to Aff. at 17.

[4] The court below said it was "skeptical" about only consolidated plaintiff Graff Pay-Per-View Inc.'s estimates of revenue loss. J.S. App. 19a-20a n.19. No similar questions were raised about Appellant Playboy's estimates, or about its direct experience in Hartford, where compliance with Section 505 through time channeling resulted in a 31 percent decline in revenue. Tr. at 18 (Test. of A. Lynn). Regardless of the precise amount of loss, however, there is no dispute regarding the fact that forcing networks to go black for 16 hours per day cuts off communication with willing adult viewers. *See Denver*, 116 S. Ct. at 2394-97 (plurality op.) (restrictions violate First Amendment even on noncommercial channels where there is no lost revenue), *id.* at 2409-10 (Kennedy, J., concurring in part, concurring in judgment, and dissenting in part) (same).

Decl. of W. Ciciora ¶ 32, and the government's experts agreed that cable operators would not convert to digital transmission to comply with Section 505, Tr. at 425-426 (Test. of J. Kramer). Installation of upgraded converters for all subscribers across the board would cost more than one billion dollars. J.S. App. 17a. Even the least expensive option would cost $8-10 million—several times more than the total profits of the affected networks.[5] Contrary to the government's claim, complete blocking is not a viable option, and its statement that the government is not required to "subsidize" such blocking is without meaning.[6] The court below, J.S. App. 32a-33a, the cable operators, Playboy Exs. 23-24, and even the government's witnesses, Tr. at 459-460 (Test. of J. Kramer), agreed that a rational cable operator would have but one choice for complying with Section 505: time channeling.

3. Contrary to Appellees' claims, Section 505 is not a narrowly tailored solution because it is not the least restrictive means and it fails to address adequately the government's stated interest.

a. The existence of a less restrictive statute aimed at the same problem as a more restrictive one strongly suggests that the challenged provision is unconstitutional. *Boos v. Barry*, 485 U.S. 312, 329 (1988); *Denver*, 116 S. Ct. at 2393

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[5] Appellees dispute Appellant's characterization of the lower court's assessment of the compliance costs associated with Section 505(a). Mot. to Aff. at 23 n.12. However, after acknowledging the "substantial expense" associated with all across the board scrambling options, the lower court found that Section 505(a) does not impose "potentially fatal economic burdens" only because cable operators may "choose to comply with § 505 by time-channeling in accordance with subsection (b)." J.S. App. 32a-33a.

[6] Appellees assert that Congress may legitimately impose some costs upon cable operators in service of an important governmental interest. But the government cannot impose costs that seriously impede speech. *Erznoznik*, 422 U.S. at 211-212 n.8. In any event, under Section 504 the government requires cable operators to provide blocking upon request at no charge to the subscriber.

(plurality op.).[7] Appellees assertion that the government has no obligation to "conclusively prove its case in favor of constitutionality" before an injunction may be granted, Mot. to Aff. at 16 n.8, effectively nullifies this constitutional requirement. Neither *Denver* nor *Sable* can be explained under the government's reasoning, since there was "no evidence" in the record in either case "as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be" yet enforcement of the law was enjoined in both cases. *Sable*, 492 U.S. at 130 (emphasis in original); *Denver*, 116 S. Ct. at 2394; *see also FCC* v. *League of Women Voters*, 468 U.S. 364, 401 n.27 (1984).

Given this settled law, it is unclear how Appellees could assume that a more restrictive measure could be justified in this case. All of the congressional findings in the Telecommunications Act support the conclusion that voluntary measures will be sufficient to empower parents to control their children's viewing.[8] Additionally, all of the government's witnesses confirmed the effectiveness of blocking upon request.[9] To whatever extent Appellees are concerned that "inattentive parents" or other "practical difficulties" may render voluntary measures less effective than Section 505, this Court explained in *Denver* that other

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[7] Appellees state that this Court "specifically cited Section 505" in *Denver*, Mot. to Aff. at 19, but neglect to mention that this Court expressly declined to rule on its constitutionality. *Denver*, 116 S. Ct. at 2392.

[8] The Telecommunications Act of 1996 §§ 551(a)(8) & (a)(9). *See Turner Broadcasting Sys.*, 512 U.S. at 678-680 (O'Connor, J., concurring in part and dissenting in part).

[9] *See* Mahlo Decl. ¶ 7 (declaring that cable system provided a lockbox the same day she requested it, and without charge); Allen Dep. Tr. at 19 (cable company installed blocking device after he complained, and it has been effective); Snesko Dep. Tr. at 51-52 (cable company made lockboxes available, and they notified their customers via post card that this option was available). Where, as here, First Amendment rights are involved, there is "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley*, 115 S. Ct. at 2344; *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984).

less restrictive measures, such as "informational requirements," could serve the government's interest fully. 116 S. Ct. at 2393-2394. Similar considerations led this Court to conclude that mandatory blocking of indecent leased access channels under Section 10(b) is "considerably" more restrictive than necessary, failing to satisfy even intermediate constitutional scrutiny. *Id.* at 2391.

b. It is also well-established that a regulation cannot be considered narrowly tailored where a substantial portion of the burden on speech does not advance the government's objective. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991); *Turner Broadcasting Sys.*, 512 U.S. at 682 (O'Connor, J., concurring in part and dissenting in part). Nevertheless, Appellees fail to address the fact that the FCC concluded that "time channeling" was inadequate to protect children from indecent programming on public and leased access channels, *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1009 (1993), and the District of Columbia Circuit affirmed this finding, *Alliance for Community Media*, 56 F.3d at 125. With respect to the scrambling option, Appellees suggest that children actively circumvent such safeguards. Mot. to Aff. at 6 n.4. But as this Court emphasized, the fact that no solution short of an absolute ban may protect against "assault by a determined child," does not permit the government to reduce the adult population to viewing only what is fit for children. *Denver*, 116 S. Ct. at 2393; *Sable*, 492 U.S. at 128.

4. Appellees' claim that Section 505 is consistent with equal protection requirements does not accurately characterize this Court's discussion of that issue in *Denver*. This Court expressly rejected the same argument when the government raised it in that case, finding in the cable television context that Congress "now has tried to deal with most of the problem." *Denver*, 116 S. Ct. at 2393. Indeed, existing safeguards, from lockboxes to the V-chip, effectively cover *all* channels, not just those selected by the government for disfavored treatment. Additionally, the government's argument that "non-adult" premium channels have less sexually explicit content than "adult" channels misses the point. Movies with no sexual content routinely include

content that goes to the heart of the government's professed interest, the audio bleed that can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749. Such R-rated films as *Beverly Hills Cop 2* contain on average a profane word every 30 seconds, Playboy Ex. 1, A. Lynn Decl. ¶ 28, and the government admits (quoting the District Court) that "non-adult channels show '*mainly* "R" rated movies which contain some sexually explicit scenes.'" Mot. to Aff. at 24 (emphasis added). Finally, without disputing Appellees' claim that the amount of "sexually explicit" programming on a non-adult premium channel is only one-sixteenth that presented on Appellant's channels, it is unclear how discriminatory treatment could be justified. The "random[]" or "intermittent[]" presentation of sexually explicit scenes on non-adult premium channels suggests that voluntary blocking solutions are far less effective for those networks than for adult channels because premium channels intersperse programming designed for children with that intended for adults, and parents cannot readily tell when the offending material may appear. *See Denver*, 116 S. Ct. at 2429 (Thomas, J., concurring in part and dissenting in part); *Alliance*, 56 F.3d at 125. Accordingly, the statutory distinction between speakers in Section 505 fails even rational basis scrutiny. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995); *cf. Erznoznik*, 422 U.S. at 214-215.

5. The government misconstrues Appellant's claim that Section 505 is unconstitutionally vague by asserting that Playboy is uncertain only about what other networks may be affected by its reach. This plainly ignores Playboy's argument that the deficiencies of Section 505 make it impossible for Appellant to adjust its own programming to conform to the law. J.S. at 27-28. In this regard, Appellees attempt to read Section 506 (which adds "nudity" to the definition of indecency) out of the Telecommunications Act. This argument ignores this Court's holding in *Pacifica*, 438 U.S. at 739-740, that statutory terms written in the disjunctive are intended to have separate meanings, as well as the holding in *Denver*, 116 S. Ct. at 2390, that leased access channels should be treated in the same way as other channels that carry "indecent" programming. Finally, Appellees' brief reinforces the conclusion that this Court must closely scrutinize the indecency standard by its suggestion that

Section 505 is subject to a lower duty of specificity applicable to civil statutes. This ploy is to no avail, since the Communications Act contains criminal penalties and the government acknowledges—as it must—that those who "willfully" violate the Communications Act are subject to criminal prosecution. Mot. to Aff. at 28 n.16. The FCC has referred indecency matters for criminal prosecution in the past, *e.g.*, *Pacifica Found. Inc.*, 2 FCC Rcd. 2698 (1987), and its discretionary ability to do so is cause for greater, not less, concern. *See Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983).

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to grant plenary review in this case.

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